



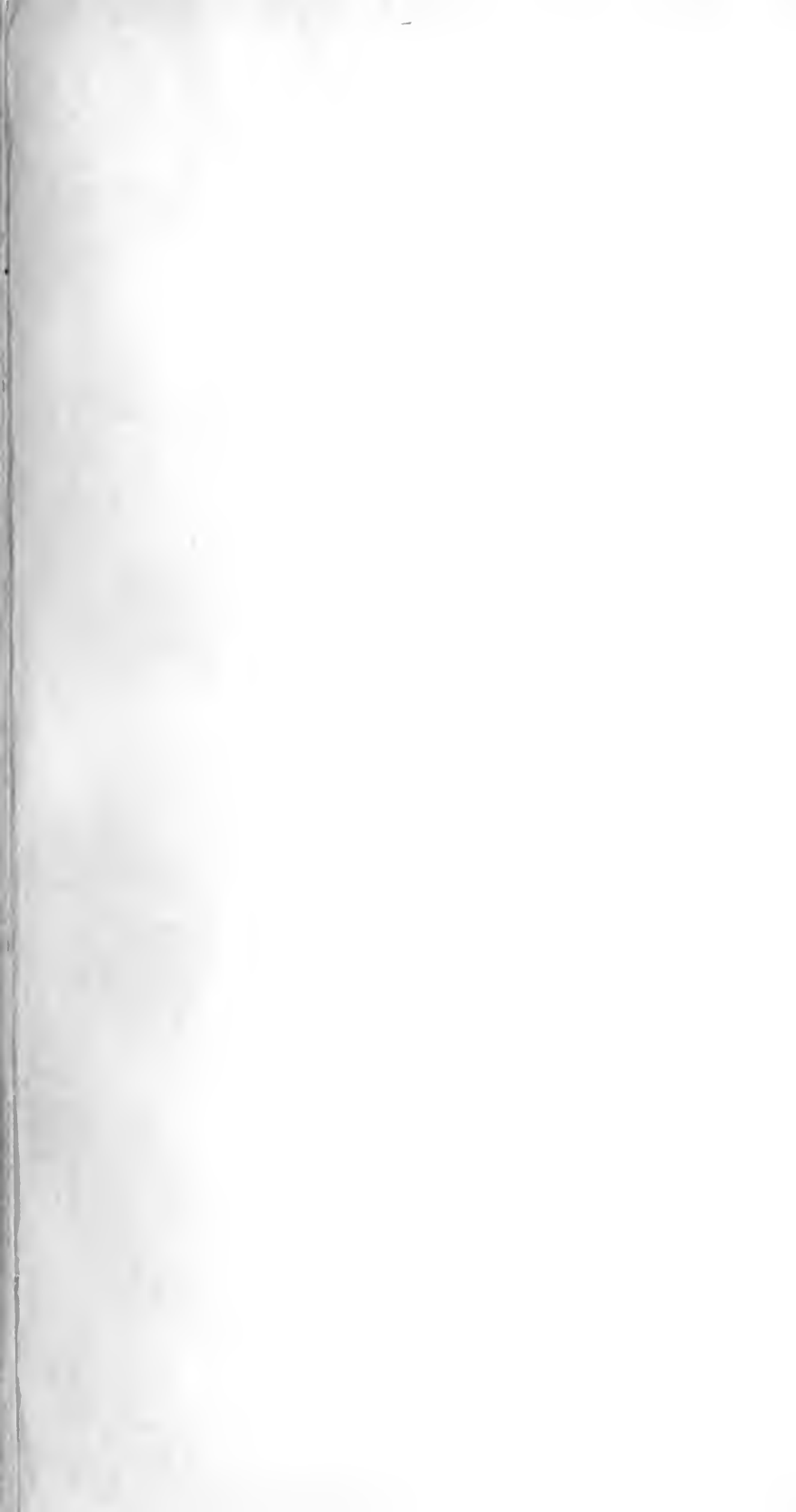


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LEGAL OUTLINES,

BEING THE SUBSTANCE OF THE FIRST TITLE OF A COURSE OF LECTURES NOW
DELIVERING IN THE UNIVERSITY OF MARYLAND.

BY

DAVID HOFFMAN,

JUR. UTRI. DOCT. GÖTTINGEN.

Indoeti discant, ament meminisse periti.

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P R E F A C E .

THE volume here offered to the public, and two others by which it will probably be followed, are designed to contain the substance of an extensive course of lectures on law, which the author is delivering in the University of Maryland. The present publication embraces only the initiatory title of the course, of which the entire scheme was stated in a Syllabus published in the year 1821, which contains eleven titles. It is far from being intended, however, to test the indulgence of the public, or add to the redundancy of the press, by a proportionate number of volumes. The work is presented with unaffected diffidence, being dedicated more especially to students, to whom its utility will be more manifest, it is hoped, when the publication of the remaining volumes, should they be called for, shall display the whole design. The work would then contain, it is believed, the only analytical outline which has yet appeared of the entire body of jurisprudence proper to be studied in this country, and may thus prove advantageous in rendering the student's transition to the 'Commentaries' less

abrupt than usual. Though there are many excellent elementary works on the Laws of England, none of them have aimed at presenting a *coup d'œil* of the entire science of jurisprudence. The object of these 'Outlines' when completed, is to furnish the law-student with a concise and orderly view of every branch of that vast system, the details of which are to occupy him through life. His future studies may perhaps be facilitated by a survey, as it were, of the geography of a vast region; with its numerous boundaries, divisions and sub-divisions; its minute and devious paths, in which it may be consoling to know that if he wanders long, it is not without method and aim.

In the lectures now given of this preliminary title, the student will find the elements of NATURAL, POLITICAL and FEUDAL JURISPRUDENCE. These may serve as a basis to his future researches, not only into the laws and institutions of England and of this country, but in that great code which regulates the communion of nations; as well as in that vast body of 'written reason,' the Roman Civil Law, together with the various systems of continental jurisprudence erected, in part, on its foundations. The topics have been treated in a method not so strictly concise and analytical as will be necessary in discussing those which are embraced in the contemplated volumes. This difference in the mode of treating the two great divisions of the work, has been preferred, because the important and extensive

learning of ethical, of political and of feudal law is too apt to be neglected by the student, who scarcely thinks he has commenced his legal studies till he begins the perusal of his Blackstone and Coke, his Hargrave and Preston—authors indeed, eminently distinguished in the peculiar municipal jurisprudence of England, but who, with many others on like subjects, are by no means sufficient to make a 'ripe scholar' in the law. These subjects have been treated by a large class of writers, many of them entitled, not merely to his passing respect, but to his serious study.

The second and third volumes are designed to treat of the elements of the Municipal law, in its most extended sense; including various titles of British, American and Roman law, which have been scarcely alluded to by the accomplished commentator on the laws of England; together with several auxiliary subjects. To embrace the analysis of a subject so extensive within the limits we have mentioned, will necessarily require much condensation, and a manner considerably different, as before remarked, from that which is adopted in the present volume. In an analysis of this kind nothing is to be omitted, yet nothing, however important and difficult, can be very fully explained. The classification must be comprehensive, natural and clear; the definitions ample, but cautious; the examples frequent and illustrative; so that the whole may present a philosophical contour of the entire system.

Should the author's desire to publish the entire scheme be accomplished, the whole work would then embrace thirteen titles, viz: the Outlines of

I. Natural, Political, and Feudal Jurisprudence.

II. The Law of *Landed Property*, technically called the law of REAL RIGHTS AND REAL REMEDIES.

III. The law of *Persons* and of *Personal Property*, technically called the law of PERSONAL RIGHTS AND PERSONAL REMEDIES.

IV. The Law of EQUITY, as it is distinguished from strict Law on the one hand, and mere Ethics on the other.

V. The Law of *Mercantile Transactions*, technically called the LEX MERCATORIA.

VI. The Law of CRIMES AND PUNISHMENTS.

VII. The ROMAN CIVIL LAW, by eminence called *The Civil Law*.

VIII. The LAW OF NATIONS, sometimes called *International Law*.

IX. The MARITIME AND ADMIRALTY LAW.

X. The CONSTITUTION AND LAWS OF THE UNITED STATES.

XI. LEGAL BIBLIOGRAPHY AND BIOGRAPHY.

XII. FORENSIC ELOQUENCE AND ORATORY.

XIII. PROFESSIONAL DEPARTMENT.

The publication of the present title separately from the others, has been induced by the consideration that most of its topics are a little too metaphysical to make their due impression through *mere*

PREFACE.

oral delivery; besides which, the remaining twelve titles are gradually becoming sufficiently extensive to occupy all the time which can at present be allotted in this way to the duties of the chair; while the analysis or substance of the entire course, if published, would serve the student as an accurate note-book of all the lectures embraced within this extensive design of the professorship.

The present title, and the others, it is supposed, might be placed in the hands of students previously to their reading the 'Commentaries' of Mr. Justice Blackstone, or the recent very able 'Commentaries on American Law,' by Chancellor Kent.

In addition to the general table of contents, the student will find at the end a syllabus of the contents, and a list of the leading books and authorities which deserve to be read by him.



TO
BRITISH STUDENTS OF LAW.

IN submitting to you this volume, the author is not aware that any of its pages are less appropriately addressed to British than to American students. The remark equally applies to his entire scheme, should it be completed. The differences in the systems of American and British law, especially in the civil and criminal branches, are gradually disappearing,—and when compared with the whole, these differences were at no time very extensive or material. The sources which supply our law are nearly the same as your own—no volume of British law remains unknown, longer than for the winds to bring it to our shores—the decisions of your courts are as familiarly relied on in our tribunals, as in yours—your statutes for the larger part, are common to us both—your elementary writers, also, are in the hands of all our students—and we are aware of no material difference in the course of study pursued in the two countries, except that the attention of our students has, perhaps, been more generally directed to the Roman and Continental law, and indeed, to all that is embraced under the head of

universal jurisprudence, than seems to be the case in England. This arises from the simple fact that your laws have long since been formed and practised—ours have been gradually adopted, and fashioned by our legislatures and courts, as occasion required—‘the world is all before us where to choose’—and, moreover, none of our laws are so deeply radicated by time, as to claim the veneration due to antiquity, or the indulgence accorded to the natural prejudices arising from long use.

With the best intentions, it has been the endeavour of the author, on various occasions, to present to the American law student, the science in its most attractive garb—to smooth for him the paths he must pursue, would he attain the highest rank in his profession—and finally, to point out, not only the most enlarged and philosophical sources, but such as are strictly practical, and of daily occurrence in his professional career. Some of the views alluded to (in connection with the present volume) are now presented for the first time to the notice of the British Law student,—and in so doing, we trust it is with no unbecoming confidence, as Americans for several centuries have mainly relied on British law works, and it is the humble wish of the author, more particularly in his ‘**COURSE OF LEGAL STUDY,**’ to invite the attention of British students, and lawyers, and statesmen, to the progress of legal science in our country, and to its extensive legal bibliography—neither of which has hitherto attracted much

notice on your side of the Atlantic, though it may, with perfect truth be declared, that in the *Lex Mercatoria*, generally, in Admiralty and Maritime law, in the great branch of Equity, in the numerous lights dawn from the Roman and Continental law—as also in various branches of Criminal Jurisprudence, and even of the strict Common law, there is a body of American judicial decision and legislation, and of learned, philosophical, and practical law treatises, that may well compare with any known to the legal bibliography of your country. This fact, when more generally known, cannot fail to excite a just and proper interest in your country—for we are almost wholly from the same British stock—our language, institutions, laws, religion, are nearly identical—and in the lapse of one century more, our population, diffusing your laws and language, will, in all probability, exceed one hundred and fifty million of souls! How natural, and beneficial and politic, then, is a reciprocal good feeling, the sure result of a reciprocal acquaintance with each others' laws, literature, science, institutions, &c. Nor should the day of small beginnings be unworthy of your notice—that day, however, has nearly passed from us,—American literature, science, law, medicine,—the mechanic arts—the utilities of life—the luxuries and refinements of life, are advancing with a rapidity but little known or believed in the old world; and never fully appreciated, but by those of our country who have carefully and personally

compared the state of things in the two hemispheres.

May your great, and glorious, and delightful country continue in its career of usefulness and prosperity. May your fields ever be green—your garners redundant—your manufactures and commerce be spread over the world—your charities continue their heaven-born influences—your proud cathedrals swell the loud anthem—and your literature, science, laws, and institutions be mainly followed, as the best exemplars of all that exalts a nation—of all that renders man individually blest. These are the earnest wishes of,

Your obedient servant,

DAVID HOFFMAN.

Baltimore, May, 1836.

LEGAL OUTLINES.

LECTURE I.

OF THE ORIGIN AND NATURE OF MAN; HIS PHYSICAL AND
MORAL CONSTITUTION.

Natura enim juris explicanda est nobis, eaque ab hominis repetenda naturâ—Cic. *de Leg. Lib. 1. c. 5.*

(1.) Of the propriety of treating of Man's nature, prior to the consideration of the science which unfolds his rights and duties. BEFORE we enter on the consideration of the science which unfolds the rights and duties of man, we deem it proper to institute some inquiry into his moral and physical constitution; in what respects he agrees with, or differs from other animals; the unity of his nature; and the relations in which he stands; and from these to deduce his duties, and his rights; since it is impossible to understand these correctly, unless we analyse the character of that being by whom they are to be discharged, and to whom they are due.

Independently of all revelation, or divine positive command, all the laws of nature, (which are the fountain and foundation of all other laws,) are only rules of conduct adapted to promote the felicity of Man. We must, therefore, ascertain his nature; the pursuits most proper to that nature; the various kinds of happiness at which he aims; how far that happiness is connected with the happiness of others; to what degree (under this view) he must control his individual propensities, in order not to interfere with the felicity

of others, and thus eventually with his own; in what relation he stands to the author of his existence; and then, from all these relations deduce his obligations to God, to himself, and to mankind.

Were any warrant for this opinion needed, except that which is found in every thinking mind, and feeling heart, we have it abundantly furnished in the writings, heathen and christian, of ancient and modern philosophers. They all concur in the sentiment, that salutary laws must have special regard, not only to the general character of man as a rational and feeling being, but also to the various modifications and inflexions of his character arising from the gradual operation of moral and physical causes. Hence, Cicero, speaking of natural jurisprudence, says, 'we must search for the nature of law in the nature of man.' '*Natura enim juris explicanda est nobis, eaque ab hominis repetenda naturâ.*' And we think the enlightened jurist of every country will agree with that distinguished Roman, that the code best adapted to any particular nation or community, can only be known by a minute inspection into the *general* and the *adventitious* character of man. Natural jurisprudence is fixed and immutable in her decrees; we ascertain her precepts by reference to the intrinsic character of man in all ages, and in all countries. Civil jurisprudence, on the other hand, is variable in some of its maxims and policy, as it derives many of its principles from what has been extrinsically added to the character of man. No one, however, can hope to study either system to advantage, who neglects the study of man, both in his moral and physical constitution. The science of his moral duties is founded in the knowledge of his moral nature; and the law which regulates his civil actions, should have regard to his physical condition, as far as it may affect his moral constitution. Psychology therefore, together with speculative and practical ethics, added to the physiology of man, should form

a main branch of every jurist's study. The infinitely changing condition of our species obtains; nevertheless, only in those circumstances which give the *colouring* to man's character: that which constitutes the essence, genius, or even the substantial form of his moral character, is liable to no change. Hence the great code of natural law may be studied with equal advantage in all ages, and in all countries; on this the municipal laws of every nation must repose; and though climate, condition, physical education, and moral habits, demand an adaptation of the laws to the character formed by these causes, it must be always borne in mind, that not one of even the most trivial of the precepts of natural law can be abrogated. There is not a natural law for the savage, and a natural law for civilized man; what is honest, just, benevolent in the one, is equally so in the other. 'Honestè vivere, alterum non lædere, suum cuique tribuere,' are precepts of universal and perpetual obligation. 'Nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthâc; sed et omnes gentes, et omni tempore, una lex et sempiterna et immortalis continebit.*' Of this law we may truly say, 'her voice is the harmony of the world;' it is the same at Athens as at Rome; the same in Britain as in this our happy land;—the same to-day, as in the beginning of time. 'Nec vero aut per senatum, aut per populum solvi hâc lege possumus;' and with Hesiod of old we may declare,

'This law did JOVE for HUMAN Race ordain:
The Beasts, the Fishes, and the Feather'd train
He left to mutual spoil, and mutual prey,
But JUSTICE gave to man.'

It is true indeed, that the duties and rights of man, as defined by this law, may be added to in a state of society; and those things which are merely *permitted* in a state of nature, may be modified or abrogated by positive law: but

* Cicero De Republica Lact. lib. 6, c. 8.

no human laws, or condition of society, can lessen the obligation of what is commanded or prohibited by this code, engraven on the hearts and minds of men by the finger of God. This is all, we presume, that can be meant by Lord Bacon, who, with as much truth as elegance, says, 'There are in nature certain fountains of justice whence all civil laws are derived but as stream; and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains.'*

A science of such vast extent as that of natural jurisprudence, should form a distinct and, for the reason I have stated, a preliminary subject of your inquiries.

In a course of lectures as comprehensive as that in which we are engaged, this subject necessarily forms a substantive branch of inquiry. Still, however, little more can be expected in a preparatory title, (which is really so extensive in itself,) than that I should present to you, in a few lectures, the skiagram, or leading outlines of this very interesting portion of your studies; and that I should furnish you with the means of enlarging your knowledge therein, and urge you to employ them with method, and persevering diligence. When I say that this is an introductory study, it is with this qualification,—that though the philosophy or elements of this extensive subject should be previously acquired, yet that every one who aims at a thorough knowledge of law, must make natural jurisprudence his study through life, during which he will have increasing proofs of the intimate connexion between just notions of ethicks, and the enactment of salutary laws.

In most of the following lectures, therefore, of the First Title of my course, I shall endeavour to condense the leading principles of natural law, so as to place before you a

* Bac. Works, vol 1. 100.

coup d'œil of a vast science, whose minute learning it will be your duty, as well as pleasing interest, to study long after your legal noviciate.

In the present lecture I shall confine myself to some observations on the nature of man, his moral and physical constitution, and shew from these how essential to his felicity is the just use of his peculiar faculties, with regard to God, the maker of the world; to himself, as a member of this great system; and to his associates in the various business and enjoyments of life.

Wide as is the system of duties, and numerous as are all the constitutions of society, whether natural and implied, or artificial and positive, you will find them, we apprehend, to flow from some few broad, general and intelligible principles, apprehensible to all, and disputable by none, and which have the strictest of that certainty which is called moral, in contradistinction to mathematical.

Man, we have said, should be considered by the philosophical legislator and jurist, in his animal and moral nature, these being the only two divisions of his peculiar inclinations and capacities. To the first appertains his desire of food, of vesture, and of shelter; of the concourse of the sexes, and of the preservation of health and of life. To the second belong his moral sympathies, and his intellectual capacities; the first including his affection for his offspring, for his parents, his relatives, and for mankind at large; and the second his reasoning faculties, his pursuit of science and knowledge, and his taste for the arts. The sympathetic affections he possesses in common with inferior animals, being distinguished from, and elevated above them, by his endowment with those qualities by which he acquires knowledge, and distinguishes between right and wrong. Man, consequently, becomes subject to a body of rules of which they cannot be the subject, because they are insensible of

the qualities and affections which these rules are designed to prescribe, encourage or control.

(2.) Idea of some Philosophers as to the triple nature of the soul, &c. In order fully to comprehend the constitution of any body, it is essential that we view it in all its integral parts. Man is evidently a being composed of a *growing, vital, and sentient* substance, denominated body, and of a subtile or immaterial *something*, called soul, which is of itself endued with various powers and affections, that impart to the corporeal parts, and to the being in his integrity, all those characteristicks which form man, and distinguish him from every other being. It was the opinion of some ancient philosophers, that the visible and material part of man is rather a secretion, or the result of certain operations, of the soul, than a distinct and independent substance. They considered the soul itself to be composed of three distinct principles, viz. rational, sensitive and vegetative, and that each was destined to perform distinct offices in the human economy, as they were the sources either of reason, of life, or of nutrition. Others varied this theory a little, by maintaining that man is a being possessed, not merely of a soul operating by three principles, but of three distinct souls, viz. rational, sensitive and vegetable; and that as the first and second of these are the sources of life and intellectuality, so is the third the fountain of nutrition or growth. The celebrated Linnæus, more recently, in his well known aphorism, seems to consider man, in common with all other animals, as endued with three distinct principles, one or the other of which is common to the other two kingdoms of nature. This philosopher, eager in the search of criterions by which all created entities should be classed, says '*Mineralia crescunt, vegetabilia crescunt et vivunt, animalia crescunt, vivunt et sentiunt,*' or, in other words, that minerals *grow*, vegetables *grow and live*, animals *grow, live and feel*. It is not for me to criticise the philosophy of so

great a master as Linnæus, or to find fault, on such an occasion as the present, with a favourite tenet of one whose intellectual vision scarce knew a limit, whose verbal accuracy was remarkable, and whose very errors, amidst the halo which surrounds his name, assume to themselves almost the body and form of conceded truths. It is obvious, however, that this aphorism is rather euphonic than sound; that it is neither philosophically correct, nor sufficiently comprehensive, if true, for its contemplated object. If we render *crescunt* by the word *grow*, it cannot be applied to minerals, for it is only organized and living bodies which are capable of growth; minerals may increase their volume by accretion, concretion, crystallization, &c. &c., but it cannot be predicated of them that they grow. So, if we render the word *crescunt* by *increase*, it would be improper to say that vegetables and animals increase, since increase is essentially different from growth, this latter being always effected by nutrition, which incorporates into the fibre, and assimilates to itself, matter taken *ab extra*. The enlargement of the volume by growth, is peculiar to bodies possessed of an internal adjustment or organization, and endued with certain degrees of vitality; whereas increase takes place without any such organization, assimilation or vitality: philosophically speaking, therefore, this word should not be applied either to animals or vegetables.* But this aphorism is still more defective in regard to man, for though man, in his mere animal nature, grows, lives and feels,—yet, in his integrity, he is something more than an animal, being possessed of principles wholly distinct from, and independent of those to which we refer the growth, vitality and sensation of the rest of animated nature. Man, in common with every other animal, is possessed of an innate active power, which never ceases to operate until death, and by which sensation, life, growth, motion, and every animal power are sustained. This *vis actiosa* is as distinct and

perpetual in its operation in the most degraded and brutalized man, as in the most enlightened of his species; and as perfect, too, in beings the lowest in the scale of intellectuality and animality, as in the highest. By this *vis vitalis* is it that animals live, are animated, nourished, moved. It is, in part, by this power that they sleep, wake, feel, select, refuse, and perform various other animal functions; yet no one can prove, though it has been so asserted, that these flow from *mind* or *soul*. Hence is it that it becomes so essential to ascertain correctly the criterions which really distinguish mind from matter; animal life from vegetable life; animal instinct from vegetable instinct; animal and vegetable life from intellectual life; instinct from sensation; and sensation from perception or intelligence. False theories and crude notions in physicks, generate false theories in morals, and consequently in jurisprudence; and this very neglect, or want of properly distinguishing between beings organized and unorganized, animal and vegetable, intelligent and unintelligent, has proved a fruitful source of mischievous error. To this cause is it that we are to refer the singular fact, that even distinguished names have been arrayed on the side of that philosophy which degrades our species to the level of the brute animal. We should remember, however, with Cicero, that '*nihil tam absurdum quod non dictum sit ab aliquo philosophorum*;' and hence we should learn to be jealous of the influence of mere *authority*; and, in matters of vital interest at least, to refuse to *philosophy* what is either not understood, or is condemned by *common sense*.

We should, perhaps, be travelling out of the province of this chair, were we to enter into a minute inquiry into the topicks to which we have alluded. They should be well understood by the inquisitive student; but they are not to be sought in the pages of even philosophical jurisprudents; they must be studied in the numerous volumes which treat

of physicks and metaphysicks, and particularly in those on human, animal and vegetable physiology. A very few words from us, therefore, on these interesting doctrines, will suffice for our present purpose, which is merely to establish the fact, that all sound legislation, and interpretation of laws, should be based on an accurate acquaintance with man's physical, intellectual and moral character.

We propose now to take a brief survey of most of the criterions which distinguish matter from mind; the principle of animal life, from the principle of the mind or soul; the features which distinguish the animal, vegetable and mineral creation from each other; and, finally, those which characterize man, and separate him from all other animated beings.

We are aware that classification is often dangerous, and that the desire of making it either very comprehensive, or the reverse, often betrays the author into serious errors. We are likewise conscious that these methodical arrangements not only savour of theory, but often originate in vain and mistaken views. Classification, however, is sometimes useful and correct. All that we now aim at, is to assist the students' future inquiries by presenting to him an outline which, at a proper season, he may fill up by his own researches.

We presume, then, that all entities, or things existing, of which man has any knowledge, may be arranged in the following manner:

1. Mind.
2. Matter.

Matter is either,

1. Organized.
2. Unorganized.

Unorganized matter has neither

1. Life,
2. Instinct,

3. Sensation, nor

4. Intelligence.

Organized matter is either

1. Animals,

2. Vegetables.

Animals are either,

1. With sensation,

2. Without sensation. (Doubtful.)

Animals with sensation are either,

1. With intelligence.

2. Without intelligence. (Doubtful.)

Animals with intelligence are

1. Those with sensation, instinct and perception, or a very limited intelligence; without a rational soul; not moral agents; whose actions are not imputable; who are incapable of society and government; not endowed with speech, though sometimes capable of uttering articulate sounds; and whose souls probably perish with their bodies. This class embraces all animals except man.

2. Those with sensation, instinct, great intelligence, a rational soul; who are moral agents; whose actions are imputable; who are endowed with speech; whose souls are incapable of disease, and certainly immortal; and who are highly fitted for society, government and law. This class embraces no other animal than man.

Vegetables are possessed of

1. Life.

2. Instinct.

Vegetables are not possessed of

1. Sensation.

2. Intelligence.

Having thus briefly stated our views as to the classification of terrestrial existences, we shall now advert to some of the criterions by which we are enabled to distinguish the three great kingdoms of nature.

First. MIND, being neither tangible nor visible, can only be known to us as it is manifested by certain operations and effects. It makes use of the animal organs and functions of the body in which it resides, in order to make itself cognizable. Our knowledge of mind, however, is principally derived to us through the medium of reflection and reason, either as to the action of our own mind, or that of others. By some philosophers the mind has been supposed to be wholly immaterial, and certainly to survive the body. By others it is contended that it is grossly material; that it has no separate existence from the body; and that it is, in fact, the mere result of the peculiar organization of the body, and consequently perishes with it. There is, however, a third class, who urge that it is a distinct and independent material entity, but composed of such tenuous, and extremely sublimated matter as will never perish, viz: of those primogenial particles which by some philosophers are supposed to have existed from all eternity. This class of theorists disclaim the name of materialists, and, we think, correctly, as few, if any of the pernicious errors of the other sect of materialists, seem to flow from their doctrine.

Secondly. Let us now advert to MATTER. If it be unorganized, it is negatively characterized by the want of life, instinct, sensation and intelligence. It is also affirmatively designated by a fortuitous formal origin; by increase in volume from accretion, crystallization, &c. and by dissolution through the agency of chemical and mechanical force. If the matter, on the other hand, be organized, it is then found to possess an origin by generation; a vital or living principle; an enlargement of its parts by growth or nutrition; and its dissolution is by death. These properties are common to all organized matter, whether vegetable or animal. There are however, as we shall presently find, various qualities peculiar to vegetable existences; others to animal beings; and the great *desideratum* is, to ascertain

the exact boundary, the precise principle which defines the mineral from the vegetable, the vegetable from the animal, the animal of intelligence and reason, from those, if any, which are endued with neither. In the more perfect specimens of each of the three grand divisions of nature, the philosopher has been at no loss for criterions whereby to distinguish the one from the other. But as he pursues his investigation, he meets with individuals so anomalously constituted, as to render it difficult, if not impracticable, to say with certainty to which of the three divisions they really appertain. Strange as it may appear, the mineral kingdom seems to fade away at its extreme boundaries, and to lose itself in the animal kingdom on the one side, and in the vegetable on the other. So, the vegetable creation appears to be lost in the animal; and the two great divisions of the animal world, in their turn, present us with beings claiming to be rational, whilst others, who are really men, have suffered their moral and intellectual natures so effectually to decline, as to render it doubtful to what division they actually belong. To get rid of these perplexities required much careful observation, sound judgment, and a firm reliance on the wholesome position, that though the God of nature has united every link in the vast chain of his creation, yet has every link of that chain its own distinctive and independent character, which must for ever keep it in its assigned place, preserve its exact identity, exclude all intermixture, and claim for it, to all eternity, the precise character impressed on it at its original formation. Every class of beings has its fixed laws, which endure no change from time or circumstance; the mineral must remain such for ever; the vegetable can never aspire to the rank of animal, nor degenerate into that of mineral. The animal of intelligence can never lose its moral and responsible nature; nor can the most careful tuition of the most sagacious of brute animals, render them reasonable or moral

agents. It is true, their outward appearance may be greatly changed by physical causes, and their inclinations and dispositions undergo a correspondent change; but their essential character and identity remain the same. These are important truths, which, we think, are now fully established. The criterions which distinguish the mineral, vegetable and animal creations from each other, as also man from those other animals which bear to him the closest resemblance, are at this time pretty well understood. We should be pleased to pass them over in silence, and content ourselves with assuming the ground, for the few reasons we have already intimated. But the young inquirer after truth may, perhaps, prefer that we should briefly allude to these criterions, and point out a few of the instances in which the contiguous limits of these three great kingdoms of nature have been supposed to fade, or to be lost in each other. As to the instances in which it has been found difficult to say with certainty whether they were mineral, vegetable or animal, we shall enumerate only a few, to serve as examples of the nature of the doubt.

First, then: Corals and Sponges were, at one time, referred by Beaumont and Woodward to the head of mineral substances; by Ray and Lister to that of vegetables; and finally, under the patronage of the learned Mr. Parkinson and others, they have assumed the rank of animals.

Secondly. On the other hand, some vegetables have for a time been regarded as minerals. Of this we have an example in the *Fontinella Antipyretica*, so named from its being a moss of such peculiar hardness as to resist fire, and to be often made use of by the poor in the north of Europe, as a lining for their chimneys, instead of mortar. We find another example in a species of moss called *Byssus*, which, on being subjected to a red heat, becomes vitrified, instead of consuming, as other vegetable substances do.

Thirdly. In the *Asbestos* we find what is called the connecting link between the mineral and vegetable world. The fracture of this mineral is in parallel filaments, not unlike those often found in wood.

Fourthly. In the *Polypus*, on the other hand, we see the being pointed out by some as the link which unites the animal with the vegetable creation. It is, indeed, a very extraordinary animal, being propagated like a vegetable, by slips or shoots. If cut into any number of pieces, each piece becomes, in a short time, a distinct and perfect animal. It may be turned inside out, with little or no disturbance of its healthy action. It is without sex, and appears to be as regardless of size, as it is of all the other usual harmonies of animal nature, having the power of enlarging or contracting its volume at pleasure, many hundred times its accustomed bulk.

Many other of these anomalies might be enumerated, but enough have been stated for our purpose. In regard to unorganized bodies, there is now not the least danger of confounding them with those which are organized, be they vegetable or animal. But how are we to ascertain the distinguishing features which, with unerring certainty, separate the animal from the vegetable? This has, indeed, been a point of extreme difficulty. The various theories advanced on this subject, have been sustained by much plausibility; but nearly all of them have, in turn, been refuted, or reasonably doubted. Still, however, the subject is sufficiently understood at this time, for every useful and practical purpose.

The criterions which have been supposed by different writers, to be peculiar to animal life, and to separate it clearly from vegetable life, are 1. Locomotion; 2. A stomach, intestines, and an alimentary canal; 3. The yielding of ammonia, on analysis; 4. A limited intelligence, called perception; 5. Nourishment from organized matter alone;

6. Sensation; 7. Muscularity; 8. Voluntary motion. Each of these has been relied on as the sure criterion, and all have been denied, by some one or other, to be certain tests. A volume would scarce suffice to unfold the arguments which have been adduced for and against these supposed attendants on animality. A word or two, however, is all that can be allowed us, who, it is to be feared, have already trespassed too long on what some may think appropriated grounds.

1. *Locomotion* has been denied to be the test, because there are plants which possess a locomotive faculty, whilst, on the other hand, there are several instances in which it is denied to animals. Should the former fact, however, be questioned, it is quite certain that the latter is true, as we find is the case with corals, corallines, oysters, muscles, sponges, &c.

2. The *stomach*, &c. have been denied to be this long sought for criterion, because the mere form of the instrument or organ of digestion, is not sufficient to constitute an essential difference, particularly as vegetables possess a power and organs so similar in their operations, as to be scarcely distinguishable; and animals, on the other hand, are in several instances either wholly without these organs, or appear to be greatly if not wholly independent of their use.

3. *Ammonia* on analysis, has likewise been found to be a very unsatisfactory criterion, since it is now ascertained that most vegetables yield, upon destructive distillation, a small portion of ammonia.

4. *Perception*, or limited intelligence. This, although it is found in all animals, differs so little, if at all, from the surprising instinct of some vegetables, that it furnishes, we think, a very fallible mark of animality. There are, indeed, instances of vegetable instinct so remarkable, that they would seem to approach much nearer to the operations of

even a reasoning faculty, than of animal instinct. We need not specify them, as the student, in the course of his general reading, will become acquainted with them, whilst to the scholar the subject, we presume, is too familiar to require being further dwelt on by me.

5. The next criterion of animality which has been greatly relied on, is that animals are supposed to possess a capacity of deriving nourishment from organized matter alone, whilst vegetable existence is sustained mainly by unorganized matter. This ingenious suggestion is advanced by M. de Mirbel, a learned French physiologist, and is very favourably spoken of by Sir Edward Smith, who, in his pleasing 'Introduction to Botany,' gives us the following extract from M. Mirbel. 'Plants alone have a power of deriving nourishment, though not indeed exclusively, from inorganic matter, as mere earths, salts or airs, substances certainly incapable of serving as food for any animals, they only feeding on what is, or has been organized matter, either of a vegetable or animal nature. So that it would seem to be the office of vegetable life alone, to transform dead matter into organized living bodies.' On this quotation Sir Edward Smith remarks, 'it appears to me so just, that I have in vain sought for any exception to it;' and M. Riche-rand adopts unequivocally the same opinion, and says, that animals cannot convert into their own substance any of the elements of unorganized matter, but that plants are the great laboratory in which nature prepares aliment for animals. It has, however, been excepted to by other physiologists, who contend that vegetables are not nourished exclusively by terrene aliments, nor are animals sustained solely by vegetable and animal substances. Instances are given of fish, worms and insects, which derive much of their sustenance from minerals, and even man has sometimes been nourished by air, water, lime, salts, &c. I should, however, be inclined to doubt the accuracy of these sup-

posed instances. It appears to me that in every instance where fish, worms and men have been sustained by unorganized matter taken into the stomach, the truth is, that these materials have either been mixed with vegetable and animal matter, sufficient to nourish life for a time, or the mere mineral substance has operated for a while as a stimulus, and the system has fed on itself. In the common case of the earthworm, for example, which feeds on soils, life is sustained only by the vegetable fibre which is contained in such soils, and we apprehend that the worm would certainly die in a very short time, if fed on mere virgin earth. This criterion, therefore, appears to us to be wholly unexceptionable.

6. *Sensation.* There is no idea more universally prevalent, than that life and sensation are necessarily associated; and an animal without sensation appears to be a *lusus naturæ* which the mind revolts at, and even philosophical faith can scarcely comprehend. It is, however, contended by some, that sensation is *not* essential to the principle of animal life, and that there are animals as wholly destitute of it, as vegetables are supposed to be; and, indeed, that there is in nature a scale of sensation, in the exact ratio of the degree of intelligence. Sensation, say they, depends upon the presence of a nervous system of some kind; and there are animals wholly without this structure, and consequently entirely destitute of feeling! In proof of this strange doctrine, they cite the case of those animals which possess the astonishing power of spontaneously casting off their limbs, when molested, and of renewing them again by a formative process peculiar to them. They also urge the case of the gadfly, which, when fastened to the hand, suffers itself to be cut or taken to pieces, before it will release its hold, and, indeed, apparently without much annoyance to its comfort. The polypus is also mentioned, which retains its full health though cut to pieces, and turned in-

side out. But all this, we think, is far from proof of the absence of sensation; these animals may feel exquisitely, but the principle of life is either extremely tenacious in them, or the organs in which it mainly resides, may not have been disturbed. That there are, however, in nature, degrees of sensation bearing a close relation to the degree of intelligence, and the perfection of the nervous structure, cannot be doubted; but that there are any animals wholly without sensation, has never been, we think, by any means satisfactorily proved; this, therefore, we regard as a second infallible criterion of animality. As to the shocking experiments on animal life, which have been made by Spallanzani, Ribaud, Valliant, Redi and others, in which beetles have been stuffed with cotton for many months; the tortoise and the snail have been deprived, the one of its brain, and the other of its head, and yet lived; it is sufficient to say that, in the beetle the organ of life had not been touched; in the tortoise the brain was not essential, as the other parts of the nervous system may have been sufficient to sustain life for a time; and as to the snail, its brain does not reside in its head, and it is well known that the snail can, by a formative power, even renew its head, when deprived of it.

7. *Muscularity.* This, likewise, has been denied to be a sure criterion, because of the similarity of the contractility and irritability of the vegetable and animal fibre. But muscularity is different from both, and although there are animals of such extreme simplicity of structure, as apparently to be mere globules of jelly infinitely small; yet even in them, the motion which they effect by alternate contraction and expansion, may be the result of muscular action, and in all probability is. Muscularity, therefore, we regard as a third infallible mark of animality.

But, should even these three fail us, as the sure criterions we are in search of, we think we *have* one which can

admit of no dispute; and, in the present inquiry, one certain distinctive mark answers every purpose; we allude,

8. To *Voluntary motion*. We have seen that there are animals which do not possess a locomotive power; so there are vegetables which possess spontaneous motion: but animal life has never been known to exist without voluntary motion; and vegetable life has never been known to manifest voluntary motion. The madrepore, the coral, the muscle, the oyster cannot voluntarily change their place; they are not endowed with locomotion; but yet they all open and shut their mouths voluntarily, either to receive or to exclude nourishment; they all move their muscles etc. voluntarily. The motion of vegetables, on the other hand, is wholly involuntary. On the whole, then, we are of opinion, that the capacity to receive nourishment from organized matter alone, the faculty of sensation, the property of muscularity, and the power of voluntary motion, are the four certain properties which distinguish animal from vegetable existences. This line being drawn, it is easy to distinguish Man from other animals, though even this has been denied; and it is easy also to ascertain, and sufficiently to demonstrate the fact, that all the differences which we find in the human family, are mere varieties flowing from the gradual operation of physical and moral causes, and consequently that man is a unit in the creation, without different species. This has been most strenuously denied by some philosophers, and as eagerly by all those who would seek some justification from nature, for their extermination of Indian intruders; their unprincipled traffick in human beings; and their packing away, as *cargo*, the oppressed Africans, as creatures, whose nerves are not as sentient, and whose blood is not as vital, as those of the white man. The subject we have been dwelling on, is quite too extensive for us to present you with even its full outlines; but it is important to urge it on your attention, as one too

closely allied to an enlarged and philosophical study of your peculiar science, to be neglected by you. But to proceed.

In *man* we certainly find a class of powers wholly distinct from those we have just mentioned, as belonging to other animals in common with man. *Thought, reflection, reminiscence, comparison, reason*, &c., differ altogether from any of the animal and vegetable powers, and being peculiar to man, are referred to that intellectual part of his being called understanding, mind or soul. These are in no degree whatever to be found in any other animal than man. That various animals have certain functions which often resemble in their operations those of the soul or mind, cannot be denied; but all of these are referrible, we think, to a different principle. They are not the offspring of intellect, of a reasoning power, but of mere perception and animal instinct; for though such animals possess a species of memory, power of selection, means of self preservation, &c. these are but instincts which lead them by an unerring and invariable law. They are not capable of self-improvement; they are all, as individuals of the same species, co-equal in their instinctive powers. Every bee, for example, fashions his beautiful net work with equal skill; every spider of the same species, weaves his web with the same mathematical perfection; every beaver forms his cabin on the same model, and with a like accuracy. Neither do these animals possess a moral sense, a conscience, a knowledge of right and wrong, a sense of Deity. They know of no distinction between actions *mala in se*, and *mala prohibita*. And this is equally the case whether we refer these moral distinctions, with Dr. Cudworth and Dr. Clarke, to the reasoning faculty; or, with Dr. Hutcheson, to the moral sense; or, with Mr. Hume, to the principle of utility, which, under his system, regards virtue and vice as merely artificial, all actions as intrinsically the same, and all moral approbation and disapprobation as flowing

solely from arbitrary or extrinsic circumstances. Whilst some philosophers, therefore, make man and brute essentially the same beings, varying only in the degree of intellectuality, the celebrated Linnæus, (perhaps without intending to do so) has given an indirect sanction to this idea, by the place which he has assigned to man in his classification of animated nature. Man, we presume, should have formed a distinct and independent class in the *systema naturæ* of that enlightened philosopher, as he unquestionably does in the scale of being. Man is constituted by the God of nature, a unit in the creation. There are no generical differences in the class to which he really belongs, nor is he allied to any other created being: his place, therefore, under the class *Mammalia*, order *Primates*, and genus *Homo*, in the system of this distinguished naturalist, is derogatory to the high nature and station which have been assigned to man by Him who created him. Man, not being a mere animal, should not have been associated with the *Simia Troglodytes*, or Angola Ape; with the *Simia Satyrus*, or Ourang Outang; and with the *Vespertilio Murinus*, or common bat.

Some justification, however, for this arrangement is sought in the ostensible design of Linnæus, to take his *indicia* of classification from the external appearances of the animal, vegetable and mineral creations; and consequently, as men, apes, ourang outangs, whales and bats nourish their young from a similar fountain, and agree in a few other respects, they must all be arranged under the class *Mammalia*, and order *Primates*. We still think, however, that as man is in truth the lord of the creation, he should have found in the system of this philosopher, a station which should have given less countenance to the infidel notions of a Monboddo, a Helvetius, a Buffon, or a Darwin; the three first of whom derive the human race from

the family of monkeys, and the other, with matchless absurdity, from that very palatable genus, the oyster!

(3.) Man not merely a gregarious, but a social animal; and herein of the universality of Natural Jurisprudence.

Although many classes of animals are found to maintain a sort of society, associating in herds, while others are solitary, they cannot properly be called social, but only gregarious animals. If man possessed only the sympathick, without the intellectual properties of his nature, he were still only a gregarious animal, though found constantly associating. But in his actual state, even the qualities which he has in common with brutes, are modified and coloured by those which they are denied. His pursuit of food, for example, is accompanied by a prospective concern for the future, of which we find only a faint resemblance in the instinct which prompts the beaver, the squirrel, and various other animals, to secrete stores over and above the stock required for immediate want. His enjoyment of food, also, is limited by considerations of health which cannot influence them; and his sexual pleasures are heightened by tender and delicate sympathies of which they are wholly insensible. So, likewise, the love of life is in man enlarged from an instinct into an emotion, rendered powerful by innumerable attachments, remembrances and anticipations. In the grossest of his appetites, therefore, he betrays a greater nobleness of nature; whilst he strongly exhibits the importance of his real destiny. Man, as we have seen, being a unit in the creation, as he forms a class by himself, in which, though there are varieties, there are neither different orders nor genera nor species, it results as a necessary illation, that the same system of natural jurisprudence is obligatory on, and every way suited to all the possible varieties which the human family has ever assumed. This wholesome position, to which our foregoing physical observations are but preliminary, has, nevertheless, been very strenuously denied, and

this foundation, on which the universality of the moral and natural law is based, has been questioned by men of distinguished genius and learning. It is contended by this class of philosophers, that mankind are made up of a number of species, radically distinct from each other: that Adam was not the progenitor of the human race; and that the gradual operation of physical and moral causes, is wholly inadequate to the production of such varieties in the human form and complexion, as present themselves in the different regions of the earth. Assuming this doctrine, they then ask with apparent triumph, how are we to apply the rules of morals universally? how extend them to one species, and to another, when the moral constitutions of these several species are as various as their several aspects? Or how can we hope, say they, that a similar legislation can ever suit the European, the Hottentot, the Negro, and the Esquimaux? In reply to these objectors, we have to deny, in the first place, both the fact, and the conclusion drawn from it. The fact of the distinct *species* of men, has never been proved by them; and if it had, it does not follow, as a necessary conclusion, that there would be a correspondent variety in their moral constitution. At all events, the burthen of proof as to the former, lies clearly on them; since it must be conceded by them that the human family has never presented in nations, or even in tribes, instances of greater disparity than we find every day among individuals of the same nation and tribe, or even of the same family, who are confessedly of common origin. The fair and lovely Circassian, whose venal parents, with extremest care, have nurtured her from tender infancy, encouraging in her the full developement of every latent beauty, and, by every artificial means, assisting the influence of the cool and refreshing breezes which come from the bright bosom of the wide spreading Caspian, is, indeed, a being of a heavenly mould, when compared to the rude

Hottentot, whose country hath neither hill nor valley; whose eyes are not refreshed by verdant lawns; and whose complexion meets with no cooling breeze to

“assuage

The torrid hell which beams upon her head.”

But a comparison of even such extremes, will not justify the conclusion of there being distinct species in the human family; since even this is, in truth, nothing more than frequently occurs between individuals born of the same parents. One raised in tenderness, and highly cultivated, becomes in beauty an Adonis, in intellect a prodigy, and in heart and affections, an object of admiration and love; whilst another, cast by circumstances on the rude ocean of life, without education, often becomes rude and disgusting in appearance, coarse in manners, cruel in heart, and as ignorant as the very brutes with which it is his delight to associate. We allege, then, that mankind are demonstrably traceable from a common stock; that every objection which has ever been made to the unity of the species, is conclusively answered in the history of man's moral and physical condition, throughout the various regions of the globe. The small eyes, high cheek bones, swarthy, copper, olive and sooty complexions, and low stature of many nations inhabiting the frigid and torrid zones; the flat nose, crisped hair, thick lips, depressed forehead, form of the cranium, structure of the tibia, &c. &c. of the African: the great differences in the facial angle, the absence of beard, the elongated mammæ, the flat head, and all the infinite varieties in the external features and aspects of men, are facts of as certain and easy solution, and more so, as the correspondent variety which we constantly find in the form, size, colour, &c. of the animal and vegetable kingdom generally, and which appearances these very objectors have never ventured to ascribe to essential differences, conceding that they are, in all cases, the result

of the combined operation of a variety of physical causes. We by no means intend to argue further this long controverted point. It is sufficient that we state, in general terms, the nature of the question, and leave the discussion of it to the anatomist and physiologist, to whom it more properly belongs.

As to the importance of the decision, however, in regard to morals and jurisprudence, there can be no doubt, since the unity of mankind establishes the unity of the moral law by which they are to be governed, although a diversity of species might not necessarily destroy the universality of that law. The question, however in its entirety, is generally understood to go the whole length of establishing the position, that if you prove the diversity of species, you destroy the certainty and universality of moral science, and excite doubts, not only as to whether all men have equal rights by nature, but whether they be capable of enjoying them. It countenances the oppression of despots, the reluctance of those in power to part with it, and the desire of the strong and wicked to govern the weak and ignorant, without the least regard to right or justice, should they happen to differ from their rulers in colour, form and habits. It lessens our abhorrence of the severities practised towards the defenceless Indians, and the cruelties often committed in enslaving the Africans; and finally, if this theory of the origin of man be true; if the Almighty hath not indeed 'made of one blood all nations of men, for to dwell on all the face of the earth,'* we should have no general standard of the moral ideas and habits of different nations, or even of different men in the same nation: the whole philosophy of ethicks would be confounded, and it would be essential to a sound legislation, that the genesis, not only of nations and tribes, but even of

* Acts xxvii. 26. Deut. xxxii. 8.

individuals, should be accurately known. For either this hypothesis must wholly deny the obligation of moral and natural law, or call upon its opponents to apply it exclusively to such nations, tribes or individuals, as have preserved an unmixed lineage, and whose common origin can be accurately traced; or else there must be allowed a universality of obligation, on the ground of expediency, since it must be admitted that it is at this time wholly impracticable to deduce the origin even of nations, much less of individuals. If, however, the burthen of proof be thrown on these captious objectors, (as it certainly ought to be) and they be embraced by the natural code, until they maintain their exemption by proving a distinct origin, and a rule of action more suitable to their nature, the theory falls harmless to the ground. We are not aware of any other mode of avoiding the difficulty resulting from this heterodox doctrine, than the one we have just intimated; for if there were originally distinct moral laws, suited to the distinct physical nature of every species, there can be now no code of universal obligation, nor, indeed, of special or particular operation, unless, in the first place, a universal system may be allowed to rest on the mere impracticability of any nation &c., objecting to be bound, after it has failed to establish its distinct lineage; or, secondly, on the ground that no nation, for the same reason, can make out its title to any particular moral law. Even admitting, then, that both were originally distinct, and accurately known, they have now become variously blended, and wholly unknown. The history of mankind is, we know, the history of innumerable migrations; the south and the north, the east and the west, have, by turns, deluged each other with the torrent of migration, and carried arts and peace, or barbarism and arms, into various climates, and amongst various races. The fertile plains of Assyria have received into their bosom the inhabitants of the vast, sterile and elevated central plain

of Asia; and the races of Italy, (themselves transplanted from the shores of the Ægean) have been lost in the hordes of barbarians from Germany and Scandinavia, which have precipitated themselves upon them. Not to multiply examples, the whole story of mankind, and all the researches of the curious, present indubitable traces of this mixture and confusion of race and lineage, manners and laws. I say nothing of that more gradual process by which individuals, in the intercourse established by trade, curiosity, or the mere rambling of chance, perpetually abandon their tribe and nation, to mingle themselves with other families, and other communities. There is no subject more curious than this, whether we regard the traces of common laws, of language, of superstitions, or of traditions, which yet continue to be discovered. The intermixture of which we have spoken, being so thorough, there appears to us no alternative but to enforce universally that system of natural jurisprudence, which the best lights of human intelligence have furnished us. I repeat, then, that if there ever existed a period in the history of the human kind, in which the races of man were traceable to several and independent origins or stocks, it exists no longer, and the pernicious objection we have been considering, falls to the ground.

What has been hitherto said, rests upon an admission which was made *argumenti gratiâ*, that a diversity of moral constitution and law, is necessarily consequent upon the proof of a distinct physical organization. But is this necessarily the case? We apprehend not. The unity of the kind certainly establishes the universality of the law; but a variety of species raises, at most, nothing more than a presumption of there being a correspondent diversity of moral constitution, and the proof of the former does not *per se* establish the latter. Whatever differences of habits, customs, and moral notions, are discoverable in various nations and countries, are imputable in so slight a degree, if any, to the

differences in organical structure, that we imagine it would puzzle the wisest of these philosophical sceptics to suggest any modification of the law of nature, or any principle of it, conformable to the difference which is observable. And were the fact fully conceded, that there are rude nations whose very virtues are the most disgusting vices in civilized life, it would not follow that these notions are the result of their peculiar organization or complexion, since it is well known that even among the most enlightened nations, nay, in the most polished families, there are sometimes individuals whose immoral education has nearly effaced all moral sense, extinguished conscience, and almost obliterated even the sense of Deity. But leaving the whole of these topics to those who are disposed to pursue them further, we shall for the future regard the moral constitution of man, and the universality of the natural law, as postulates, without again disputing whether man has been aptly classed; whether the unity of his descent be demonstrated; or whether the great code to which Moses, Confucius, Seneca and Socrates have paid almost equal homage, be or be not equally applicable to all conditions of life, and to all the varieties of mankind. We believe that what are known to us as the natural duties and rights of man, form the subject of all law whatever, whether applied to man's situation before his entrance into communities, and therefore called the 'LAW OF NATURE;' or to the relative situation of such various communities after they are established, and then called the 'LAW OF NATIONS;' or to man's situation within particular communities, and then styled the 'MUNICIPAL LAW.'

(4.) Man endued with reason, and progressive in knowledge. From what has already been said of the nature of man, it is perhaps sufficiently obvious that reason is a faculty or power of mind, and, as such, appertains exclusively to man. It is that principle by which we compare several ideas, and

deduce consequences from the relations which connect them. Some philosophers have considered the reason of man as only an amplification, and fuller developement of a faculty existing in all animals, in degrees exactly suited to their respective natures. On this subject the two celebrated French metaphysicians, Des Cartes and Helvetius, have advanced theories totally opposite to each other, whilst both of them are extremes, from which rational minds cannot fail to revolt. According to Des Cartes, all brutes are mere animal machines, having no one faculty in common with man. He denies to them all ideas, sensation, and even life. With them pain and pleasure, baying the moon, and speed in the chase, are the necessary results of mere mechanical evolutions. Helvetius, on the other extreme, contends that men and brutes differ only in their means and degrees of education; that animals are endued with reason, and that bodily organization makes the only difference between the soul of a rhinoceros, and that of a Newton. The monkey tribe, who use their paws with admirable dexterity, would, according to that philosopher, be as progressive in knowledge as man, were it not for bodily defects, which repress the energies of their genius! That they still inhabit the hollows of trees and rocks, and have not society and government, huts and palaces, he ascribes to their inferiority to man in numbers, strength, and duration of life, and to their being nourished by food so easily procured. Absurd as the views of both these philosophers surely are, they had their admirers. The enlightened Pascal was charmed with the mechanical hypothesis of Des Cartes; and the mental theory of Helvetius gained ground, not only in France, but on the continent generally, and even in England. Dr. Darwin has gone quite as far as Helvetius, and ascribes all the actions of instinct to reason; whilst that intelligent and agreeable writer, Mr. Smellie, contends that *reason is the necessary consequence of the use of instinct*. That all these

views are erroneous, we entertain not the least doubt; but we have no occasion, even if time would serve, to use much exertion in their refutation.

According to Locke, man exercises, in the act of reasoning, both sagacity and illation; and in such a manner, as to display four distinct powers. If, then, the brute be denied either of these, he does not *reason*, any more than those animals which pronounce articulate sounds, can be said to *speak*, since they are incapable of conceiving the idea expressed by the words which they utter. Man, in the operation of reasoning, discovers proofs by the faculty of *invention*. These he arranges in such a manner by *method*, as to make apparent their several relations. By the faculty of *judgment* he perceives with accuracy these subsisting connexions; and, finally, by *illation* he deduces a just conclusion from all that has been presented to him. Brute animals, on the contrary, are wholly incapable of mental induction: they have neither universal and abstract ideas, nor the power of treasuring up knowledge, though they may be made to do a variety of amusing acts which bear a close resemblance to the power of progressive improvement. Animal instinct displays itself in a manner essentially different from reason. Beasts of the greatest physical powers, and eminently sagacious and docile, are nevertheless wholly incapable of exercising dominion or government, over either their own or other species. The most illiterate and dull of our species, is able to manage the most intelligent animals, and by a little reason to conquer brutal strength, and subject it to the most submissive obedience. It is true, indeed, that animals are not left to the guidance of mere chance, but, on the contrary, are often skilful, methodical and persevering. But in all these cases they act by an invariable law of their nature; to use the idea, without the poetical dress of Pope, instinct *must* go right, though reason *may* go wrong. Whilst honest instinct comes a volunteer, reason comes, on all occa-

sions, at our call, is varied at our will, and infinitely combined and modified to subserve every possible purpose of virtue or of vice, of gaining power, or of destroying it, of governing man, or of being governed. Physical power and reason give man the sovereignty over creation; brutal strength and instinct confer no power but what is exactly defined in its extent, and mode of use. One animal, it is admitted, preys on another; but even this *bellum omnium in omnia* has its inflexible laws, which they cannot violate; it is wholly incapable either of producing an accumulation of power, or of being used for any other purpose than that for which it was established, viz. as a means of sustenance. In its exercise there is no attribute of mind; and in its consequences it bears no resemblance whatever to the like power when exerted by man.

But man in the use of reason, makes it subservient to many other purposes than the acquisition of knowledge, and the subjection of his species to government and laws. Nature hath ordained that in man,

‘Custom should mould to every clime
The soft Promethean clay.’

He is consequently the inhabitant of every region of the globe. The equatorial heats, and hyperborean frosts, are alike to him. Universal nature has become tributary to his wants, as he enjoys the power of extracting from it, through the mechanic arts, what the united strength of thousands of his species, or that of brutes, could never effect. He procures his food in places, and under circumstances, where irrational animals would perish with hunger; he renders, by the nicest culinary processes, that which is poisonous, not only innoxious, but salutary; he studies his own physical nature, and derives from minerals and vegetables, medicines adapted to every disease; he exercises his reason and affections through the medium of written and verbal language; by these he communicates all

his opinions, desires, wants, passions, and the most abstract and refined notions; by written language time and space are overcome, and the people of one country, and one age, are made familiar with the opinions and knowledge of other countries, and other ages. In man, speech is in a great degree the creation of his own inventive powers; the voices and cries of brutes are *born* with them, and never go beyond a very limited range; the instinct of brutes can effect nothing which bears the slightest resemblance to this divine attribute of man. In animals, the organs of speech are often perfect, and pronounciation distinct and accurate; yet they possess in no degree the power of speech. Mere machines may be made to walk, to fly, and even to utter sound surprisingly articulate; but this, in truth, is neither walking, flying nor speaking. So the parrot, the magpie, and the nightingale, though they have the tongue, and particularly the larynx, nearly as well adapted for speech as those in man, and are thus enabled to utter words, or articulate sounds, are in this respect little else than machines. *Language* is something more than the utterance of mere words; it implies thought and reason associated with the words; and as brutes can neither combine thought with articulate sounds, nor unite nor separate ideas, they are incapable both of reason and of speech.

Although birds and other animals have been sometimes taught to mimic man in the pre-eminent and ennobling faculty of speech, we agree with Dugald Stewart, in explaining rather by ventriloquism than any thing else, the surprising account which is given by the German philosopher, Leibnitz, of a dog who spoke. A history of this remarkable animal was given by Leibnitz to the Abbé de St. Pière, and by him transmitted to the Royal Academy of Paris. The statement is, that the dog pronounced accurately the entire alphabet, except the M, N and X, and spoke very accurately about thirty words, among which

were the French words for *chocolate*, *coffee* and *tea*. But the account concludes with stating that he spoke through *echo*; that is, after his master had pronounced the word. We believe that Leibnitz and others were, in this instance, ignorantly credulous; but we cannot fully concur with Professor Stewart in regarding the case as absurd or impossible; for though the dog's tongue is certainly less adapted for the utterance of words than that of some birds, yet it is well known at this day, and attested by incontrovertible facts, that the tongue is not an essential organ of speech, but that the larynx frequently performs every office usually attributed to the tongue. Several instances are recorded where voice, speech, deglutition, and even taste have been most accurately perfect, although the tongue has been wholly wanting; and in other cases, the tongue, and apparently the larynx, have been perfect, and yet the animal was dumb. Speech in man, and the faculty possessed by some animals of uttering articulate sounds, do not essentially depend on the formation of the tongue, and nothing can be more groundless than the vulgar notion of some people, that all animals would speak, if the various organs in them were adapted to such an utterance. This, indeed, was the opinion of Helvetius and his disciples, to which we have before alluded. It is not pretended in any of the surprising instances of speaking birds and other animals, that they were endued with a degree of intelligence beyond their species. Mr. O'Kelley's celebrated parrot, which repeated with accuracy not less than twenty of the popular songs of the country, and sung them to appropriate tunes, was not remarkable for the least intelligence in other respects, or even in the execution of this surprising modulation of its voice, as it was invariably performed according to a necessary law, from which it could not in any degree vary. Nor will the bullfinch, the nightingale, the raven, the jay, nor our delightful mocking-bird, be regarded by any reflecting mind,

as possessed of more reason, intelligence or intellect, than the rest of their silent, or less musical companions of the grove.

It appears on the whole, therefore, that speech in man is the highest evidence of a rational soul; and, when mimicked by other beings, furnishes no evidence whatever of mind or soul in them. Articulate language is not only peculiar to man, but stands pre-eminent as the faculty which invokes him to the cultivation of the numerous other powers of his nature, that adapt him to society, government and laws. Hence is it that men in all ages, and in all climates, being gifted with speech, have assembled in communities, for society and government of some kind or other. But this, as we have already shown, is not a mere gregarious association; for the rudiments of these social sympathies, (the fountain of such lively pleasure in civilized life) are still discernible in the most solitary tribes that gain their food by the lonely avocation of hunting. Even among them, the relations of husband and wife, parent and child, are maintained, if with less delicacy, often with more liveliness, and add their force to the calls of appetite, to urge the savage from his indolent repose to the toils of the chase. Neither does the parent, in these rude associations, abandon his offspring on the recurrence of new progeny; nor does the offspring become unmindful of its parent, when no longer dependent on it for nutriment or support. The wife and husband are not forgotten with every recurring season, but add to that tie the lasting one of the parent, and of the mutual friend; and these relations, which thus become so much more durable than the same among brutes, are coloured, heightened and ennobled by the simultaneous operation of the moral feelings. From this intimate association of men under all circumstances, spring two obvious conclusions; *first*, that it is the result of their nature, and essential to their happiness, since men are impelled, in the

main, to what conduces to happiness; and *secondly*, that it is necessary that they should cultivate those qualities which perpetuate, cement and embellish this association. To this foundation, therefore, may be referred the duties of benevolence and affection, of mildness, of charity, of compassion; of all those natural sentiments, in short, which have no relation to *positive* institutions, and which are found existing through the earth, independently of them. Man then, as we have seen, is a being endowed not only with a heart, but an intellect, each of which is susceptible of the highest improvement; and as the first connects him with his own species, and attaches him to it, the second connects him with all other objects, animate and inanimate, of the world around him; nay, of the universe. To observe the external appearances of these, to examine their peculiar properties and structures, their connexions and relations with each other, is an instinctive emotion, and an exhaustless source of gratification. This is observable in the wandering inclinations of uncivilized tribes, for even in our least refined state, the soul prompts us to ramble in the fields, and to revel on the beauty and varieties of nature. Hence the life of such as are deemed even the most unob-servant, is one long lesson: we gradually accumulate a vast multitude of facts, insensibly arrange them in their classes, and deduce from them general laws; whilst we listen with great interest to the results of other men's observation, and endeavour to make them our own. By a happy wisdom, too, of nature, the knowledge of most of these truths adds, in some mode and degree, to our physical comfort: we are consequently impelled to the study of them by an additional motive. The curiosity which led the indolent gazer on the Assyrian plains, to look upward on the brightness of the heavens, led also to the regulation of times and seasons. The pleasure of inhaling the perfume of a flower, led the way to the discovery of its medicinal or nutritious pro-

perties. The study of his fellow men was yet more natural to the untaught rover of the primeval earth, since it was not less interesting to his curiosity, than necessary to his happiness and safety. Every where, in short, man is seen progressive in knowledge, and reasoning towards useful results, from the phenomena around him.

(5.) Man a religious animal. As man is the only being endowed with reason, and progressive in knowledge, it necessarily follows that he is the only religious animal. Endued with social affections, and with intellectual capacities, both of which, though in a different manner, conduce to his internal happiness; and directed by his reason to select from the abundance around him, whatever of the material creation may minister to his external wants or gratification, man naturally looks around him for the great author of his bounty. In every form of nature he sees the traces of design and of skill; but he sees no where the being capable of design so comprehensive, or of skill so exquisite. None of his own capacities, or what he observes of others', lead him to the idea that *man* can be the author of the world, and all its crowd of beauties: his thoughts are therefore naturally elevated to the conception of some superior being, whose powers are adequate to the contrivance and execution of a system so perfect, so vast, and so various; in other words, to the conception of a God. While his miracles impress him with the idea of his vastness, the daily perception of his bounty impresses him with the feeling of dependence and of gratitude, and these combined emotions are what is called RELIGION.

Whatever complexion or stature or form, an African sun, or Siberian frosts may have impressed on man, and whatever varieties we meet with in his moral constitution, we find that religion, of some kind, is ever present. Man, if he reflects at all, is compelled to recognize the existence of something within him, different from, and independent,

in a great degree, of the external or corporeal part. His experience soon teaches him that this active and ever busy intelligence is not so intimately connected with the body, but that it may possibly, and very probably will, exist after the body's dissolution. This belief is inseparably associated with the sense of Deity, the perception of right and wrong, and the expectation of a future life, and of retributive justice. These are doctrines, though often greatly abused by the most disgusting fantasies, recognized, in some form or other, in all ages, and by all people. Whether the universality of these opinions be owing to their perfect consonance with reason, or whether they be the doctrines of a primeval revelation, preserved in greater or less purity by all people, is not for us to say. *Quicquid est illud, says Cicero, quod sapit, quod vult, quod viget, cæleste et divinum est; ob eamque rem æternum sit necesse est.*

In conclusion of this part of our subject, I may observe, that though it be painful to contemplate the false views, and shocking superstitions which this conception has generated among mankind, it is equally interesting to discover its unbounded prevalence, its general happy influence on the government and laws of most nations, and that it invariably forms a part of the intellectual treasure of man, in whatever region he may be found. Religion, then, being natural to man, and essential to his happiness, is most intimately connected with civil, as well as natural jurisprudence, it being the object of all law to prescribe to man such rules of conduct, as may be best suited to promote his temporal, as far as that may not interfere with his eternal felicity.

(6) Man a free agent. The next striking difference between man, and the other organized beings which surround him, is the freedom of his Will. Amidst the multitude and variety of the existences by which he is encompassed, he wanders not with a blind impulse towards

one or the other. Unlike animals, he is not confined to the selection of certain invariable elements of enjoyment, nor within the range of a limited choice, but he is at liberty to choose between the opposite extremes of evil and good. It is when we apply this liberty of thought and of action to morals, that we find the most singular feature in man's nature, and the foundation, indeed, of all moral obligation. Were man invariably directed either to good or evil, he might fold his arms with the sentiment of indolent enjoyment, or of reckless despair, and wholly lose the activity of sentiment and action which gives such charm and point to his existence.

We are accustomed, indeed, to speak of instincts, of inclinations, and of passions, as strong tendencies towards particular objects or pursuits; and we hear, in common speech, of the *power* of these passions, and the *force* of these instincts. Hence it has been urged, in contradiction of the free will of man, that these passions and instincts have the power of controlling us; and that a being thus impelled, cannot be said to be the lord of his will. Without dwelling much on this objection, which, if true, saps the very foundation of morals, it is sufficient briefly to explain what is meant by the free agency of man; and this brief inquiry will, of itself, it is hoped, suggest the reply, and assure us that we are not less free agents, and morally responsible beings, because we are affected by instincts, inclinations and passions. WILL is that power of the soul by which it selects the objects of its *action*, its *passion*, and its *thoughts*, and which leads it, when we speak of morals, to the selection of what ministers to its happiness or its ill. In the whole scope of metaphysical research, there is perhaps no subject which has been more elaborately disputed than the one before us. It is far from my design to enter into an examination of the arguments ingeniously suggested in opposition to man's free agency; but as

the point is too important, as regards the obligation, no less of human than of divine law, to be passed over in silence, I shall take a hasty survey of the controversy, and refer the student to ample sources of information, which he may consult at leisure.

Whatever skill and subtlety have been exhibited in disputing this doctrine, every rational man is apt, very early in the inquiry, to appeal to his own *consciousness* of the freedom of his will, and to feel great reluctance in abandoning that firm and safe foundation, to wander on the sea of argument. It is true, indeed, that several learned and profound thinkers, among whom is Mr. Collins, have denied to man this very consciousness which I have assumed. But as most men would be apt to pay more respect to their own experience than to Mr. Collins' reasoning; and as it would be unsuited to the object of such elementary inquiries as ours, to enter into metaphysical arguments on such a point, I shall continue to regard it as a *fact*, that every man *is* conscious that he is a free agent, or, in other words, that he knows and feels that 'he can act if he will, and forbear if he will,' which is Hobbes's own definition of free agency. This doctrine, that every man is conscious of a liberty to choose and direct, in all conceivable situations, though passions may sometimes gain the ascendancy, and lead him astray from his purpose, is one which Collins saw the necessity of endeavouring to refute, and therefore is it, that he boldly assumed the reverse position, and contended that the consciousness was, that man is *not* a free agent. This issue of fact, however, cannot be settled, and perhaps need not be, if we adopt the idea of the celebrated Kant, that every one who *conceives* himself to be a free agent, is rendered, by his own belief, a moral and accountable being, although he be in fact a necessary agent.

It is now proper that we advert to the distinction existing between Will and Liberty, words too frequently confounded, and the difference between which is certainly, very nice. Locke defines Will to be that faculty of the soul by which it begins or forbears, continues or ends, any action of the mind or of the body, merely by a thought or preference of the mind; it consists in the power of preferring to move, or not to move the body, to exert, or not to exert the mind. Liberty, on the other hand, does not belong to the will, but to the *person* having the will; he has the power or liberty to execute the will or not, as he pleases. I confess this appears to me a very unsatisfactory statement of the distinction. If the will be free, as I admit it to be, and this consists of a power of preferring one thing to another, this preference, when made, is a volition, or, as it is sometimes called, a judgment, pronounced by the will.—If liberty, then, be equally free, that is, if we have the power to execute the volition or not, as we please, and do accordingly execute it, or decline so to do, all that can be said is, that when we have executed the volition, we have only done that which we would have done had there been no liberty. If we have *not* executed that volition, then we have merely formed a new volition, and executed that. I cannot, therefore, see the least necessity for the distinction between volition and liberty, if it is to be considered in this point of view. If this be the only mode in which we are to regard the subject, I would say that the will is free, but that there is no such thing as liberty distinct from free will, because we have no power to refuse to execute the will; and that in all cases where liberty appears to have been exerted, it is nothing more than the formation of a new will, or rather volition, and the *execution* of that second volition. The will is a *faculty*, but when it is exerted by volition, that very volition is itself an execution of the will, and excludes all liberty. I cannot

will to walk, (having the physical power to do so) unless I do walk.

I may, indeed, desire to walk, and have no physical power to do so; and so I may will to walk at a future period, having the present ability to walk; but if I really desire *in præsenti* to walk, or rather will to walk, having the present faculty, I inevitably execute the act of walking. I admit that volition, or the mere act of willing, is one thing, and the physical performance another; but whether the thing willed be a mental or a physical operation, it is performed in the very act of willing. If I will to do a future act, the will is so far forth executed, and when the future act comes to be performed, it is the *physical* execution either of the continued will, or of a new one, founded on new or additional motives. It appears, therefore, that *freedom of the will* expresses every thing that is intended, without the word *liberty*; and, consequently, that there is no occasion to speak of will and liberty as distinct faculties, one being a *general desire* for a good, the other a faculty of *suspending* the will, until we are better satisfied that the thing desired is really for our good. Both of these operations are, we think, embraced by the freedom of will. We never do *will* what is impossible, though we may *desire* it. If the will be free, it is equally free to act after it has willed; freedom of will includes liberty of action; or, in other words, *willing* cannot be distinguished from *acting*, since acting is necessarily consequent upon willing, if the agent, at the time, possesses the physical ability to act. The mind never does will an impossibility *ex naturâ*; but it may well *will* what is *possible to be done*, though it be impossible to be done *by the person* who wills, merely in consequence of a physical impediment of which he was not conscious. The moment he becomes fully conscious of the physical defect, he may desire, but he cannot will to do the act.

The mere faculty, then, is one thing, the volition is another. But when will and liberty are attempted to be distinguished, we should only contrast the mere faculty of will, with the mere faculty of liberty, in which case, all that it can mean is, that as the faculty of will is perfectly free, it has the liberty or power of calling on the judgment to assist it in its determinations. But even in this sense, there is no utility in the word liberty. It appears to us that the distinction attempted to be maintained, arose from confounding the *will*, considered as a faculty, with the *judgment* summoned to its aid to produce a volition. If by liberty is meant the power of acting contrary to the will, or to a volition, which is the *act* of the will, no such power, we think, exists; but if by liberty be meant the power of acting contrary to the dictates of the judgment, it certainly does exist. Will, then, or volition is one thing, liberty is another, having nothing to do with the will, but much to do with the judgment. It is true that liberty can be predicated only of a being endued with will; but we cannot understand Mr. Dugald Stewart, when he says that it is the province of liberty to *execute* the will, and that it relates to the will only *after* it is formed. To say that liberty executes the will, appears to us to be wholly without meaning, since a mere faculty cannot be executed. If, on the other hand, it means that it is the province of liberty to execute the *acts* of the will, that is, its volitions, it appears to us equally unmeaning, as the volition is itself a thing executed, and not *in fieri*. The will, as I have before said, is a mere faculty; a volition is the determination or decision of that faculty. The volition, then, is a completely executed act of the will; being executed, there is no deviating from *that volition*. The will may again act, and the new volition may reverse the effects of the first, but it cannot recall the first. So, again, we should distinguish between judgment and volition; liberty will enable

us to execute our judgments, or to disregard them; but liberty can never enable us to disregard our volition, for that being past, is irrevocable. All, then, that we mean by objecting to the use of the word liberty, as applied to the will or volition, is simply to express our opinion, that the doctrine of liberty has been erroneously applied to the will, instead of the judgment. But passing over this, we will speak of the will, and of liberty, as they are generally understood. Malebranche defines will to be the impression, or *natural motion*, which carries us towards good *indeterminately*, and in the *general*, and says that liberty consists in the power which the mind has to direct this general impression towards some *particular* object. Now, in this account of the matter, the learned Father appears to give freedom to *liberty*, but to deny it, in a great degree, to the *will*. Mr. Locke also, without intending it, seems to make the acts of the will rather necessary than free, when he says that the will is always determined by some, and, for the most part, by the most pressing uneasiness, or desire of happiness. Others have held the same doctrine; for, say they, 'it is not in the power of the will not to desire to be happy.' If will be that faculty of the soul by which it is urged of *itself*, in virtue of an instinctive principle inherent in its nature, to seek for what is agreeable to it, to act after a certain manner, and to perform, or to omit an action, with a view to some good; and if liberty be that faculty of the soul by which it regulates its actions as it pleases, without regard even to the dictates of judgment, and suspends, continues or modifies its thoughts and operations, either in affirmance, or in disregard of previous judgments; it follows that actions are divisible into *voluntary* and *involuntary*, *necessary* and *free*. Those actions are denominated voluntary and involuntary, which concern the will; whilst such as concern liberty, are called free and necessary. All *free* actions are, of course, voluntary, but

all voluntary actions are not free. Where the action, though voluntary, is not a free one, it is manifest that the action has been willed or performed after a judgment formed by the mind upon all the motives for and against the act. On the other hand, where the action is both voluntary and free, these conflicting motives do not present themselves; there is no occasion to invoke the judgment, but the act of willing is, in such case, nearly instantaneous. If, for example, we are awed by fear, or respect for authority, and induced thereby to commit an act which was condemned by our conscience or judgment, the act is voluntary, but not free. Our will has prompted the action, after some contest between the conflicting inducements; but our liberty of choice, or willing, was under restraint. We have, nevertheless, chosen what perhaps our judgment pronounced the less of two evils; we have avoided the present evil, and taken chances for that which is future. At the very first, our conscience or judgment assured us, that the required act was *malum in se*, or *malum prohibitum*; but we have weighed our notions of the several penalties, present or future, which may be attached to the commission or omission of the act, and we form a second judgment, erroneous perhaps, and *do* the act. This class of actions has received the name of mixed actions, because they are partly voluntary, and partly necessary.

The arguments in favour of the doctrine of necessity, are to be found in the writings of nearly every metaphysical author. The champions in favour of necessity have been among the most distinguished philosophers of ancient and modern times. Yet as to the immoral tendency of the theory of necessity, there can be little doubt, though Collins, Hume and others have vehemently contended that it is not only consistent with sound and practical ethics, but the only one which is really so. Viewing the subject as a mere matter of argument or demonstration, we are free to

own that we cannot perceive that either party has gained a decided victory. But, at the same time, the advocates of free will have, as we before stated, two reasons for its adoption which we contend do not belong to the others. The *first* is, says Reid, 'a natural conviction or belief that we do act freely, a conviction so early, and so universal, that it must be the result of our constitution, and the work of him that made us.' This, I contend, is the common sense of all nations, and of all individuals. Every human being practises upon this opinion; we all *feel* that we are free agents; we believe that we can will to act, or to be still; to walk, sleep, read or contemplate. We can add fuel to the flame of our passions, or at once extinguish it. The most poignant grief may be subdued by our conscience or reason, and all the powers of ineffable wit and humour shall not excite even a smile, or a mental emotion, if we so will it. If these be facts, they oppose a powerful battery against all that can be urged by the ingenious reasonings of the sceptical metaphysician.

The *second* ground which gives superiority, we think, to the doctrine of free agency, independently of mere argument, is, that it is a more salutary opinion than that of necessity. We agree with Dr. Reid, that 'if the terms MORAL OBLIGATION and ACCOUNTABLENESS, PRAISE and BLAME, MERIT and DEMERIT, JUSTICE and INJUSTICE, REWARD and PUNISHMENT, WISDOM and FOLLY, VIRTUE and VICE, be applied to the system of necessity, they are improperly used, or should have new meanings given to them when used in religion, in morals, or in civil government; for, upon that system, there can be no such things as they have always been used to signify.'

On the other hand, mere *free agency* does not *in se* create moral obligation or accountableness; we must add to this an actual sense or knowledge of the distinction between right and wrong. Our first parents, before their

violation of the only law that was given them, were as much free agents as afterwards; but consequent upon their transgression, was an unlimited knowledge of the difference between virtue and vice, right and wrong; and from that moment only, we presume, were their actions imputable. So, mere animals, to whom this single law was never given, are free agents, but, having no knowledge whatever of the distinction between right and wrong, their acts are not imputable to them. So that whether animals are endowed with a limited reason and intelligence, or not, they cannot be supposed to be responsible merely because they are free agents. Man, therefore, is not a moral and responsible being, subjected to divine and human laws, because he is a free agent, but because he likewise knows the difference between vice and virtue, between actions which are *mala in se*, and those which are merely *mala prohibita*.

We shall close our brief and desultory remarks on free will and necessity, with some notice of the singular doctrines of the German philosopher Leibnitz, who denies, not only the possibility of man's free agency, but would bind Deity himself with the same eternal chain. For this purpose he has invoked, in a wordy jargon, what he calls, first, the 'PRINCIPLE OF THE SUFFICIENT REASON;' secondly, the 'LAW OF CONTINUITY;' and thirdly, the doctrine of 'PRE-ESTABLISHED HARMONY.' A brief account of each of these will be sufficient for our purpose.

By the principle of the *sufficient reason*, Leibnitz appears to mean that nothing can happen without a reason why it should be so, rather than the contrary, or, in other words, that every thing which exists has its reason for thus existing, and that it is incapable of having any other reason. This simple position appears both plausible and unobjectionable; but the inferences deduced by him from

it, and his extraordinary application of the doctrine, form the subject of complaint.

Under the auspices of the doctrine of a sufficient reason, he argues that it was not in the power even of Deity to create or fashion two things exactly alike. This he infers, after stating that the mind is guided in its volition by the most apparent good; so that it would be impossible to make any choice between things entirely alike, nor would it be possible that things of this like kind, which he calls 'indiscernibles,' could ever have been created. Under the same auspices, he of course infers the necessity of man's actions, because no action can take place without a motive, and no motive will produce an effect, unless it be a sufficient motive or reason. From the same source he derives his demonstration of the existence of a God; also his argument against a vacuum, which he rejects merely because the *parts* of such vacuum must be alike! Under the guidance of this convenient magical phrase, he also discarded the atomic philosophy, and introduced his *monads* in the stead of Des Cartes' particles of matter, which, as they must be *like each other*, did not agree with the distinguishing features of his philosophy. He therefore made his monads consist of *principles*, endued with appetites, and perceptions of an *indefinite variety*!

It is manifest, from what has been said of this much vaunted sufficient reason, that it is the offspring of a mind given to such continued and deep reflection, as to have become morbidly imaginative. If there is much plausibility in some of his views on the doctrine of sufficient reason, its general error and futility are so manifest as to require no comment from us. Such whimsies of a learned mind, and ardent imagination, are entertaining enough, when we desire to be entertained; but when they assume the names of grave science, and of sound philosophy; when they are taught to us by a reformer who would raise

himself upon the ruins of a popular, though equally absurd philosophy; they become rather disgusting than otherwise, and bid us unite with Bolingbroke in the inquiry, 'Is it worth while to gain the name of a philosopher, at the expense of amusing mankind with such hypothetical extravagances?'

The second principle which Leibnitz summoned in aid of his views of necessity, is what he called the *law of continuity*. Availing himself of the too popular tendency of men to be carried away by terse phrases, and uncurrent words, he on this, as well as the former occasion, throws around his principle a little vagueness and mystery, by the use of formal and unknown expressions. Had the principle of 'the sufficient reason,' and the law of 'continuity,' been expressed without a set form of words, and in their mere naked meaning, it is quite possible they never would have made as distinguished a figure in the books, or have been in the mouths of as many, as we find them. By the law of continuity Leibnitz means, that there is a *fixed concatenation* subsisting between all existences, events and truths: that every thing, physical as well as moral, that exists, ever did exist, or ever shall exist or happen, is thus connected. From this supposed law of continuity, he and his disciples deduce a variety of startling positions in morals, physicks and metaphysicks; such as, that there is in nature a scale of gradual descent from Deity to the simplest particle of unorganized matter; that the whole of this vast scale of the universe admits not of the least *saltus* nor chasm; that perfectly hard bodies cannot exist in nature; that any body, in changing its state of motion or rest, passes through all the intermediate degrees of velocity; that the soul is necessarily an ever active and thinking principle; that the vulgar notion of death is impossible to be true; that all of nature's operations are effected by infinitely small degrees, that is, according to the law of an un-

broken continuity, which never violates the maxim assumed by them, viz. 'quod natura non operatur per saltum.' All these deductions from the law of continuity have been commented upon, and satisfactorily refuted by several able writers. We need not advert to the arguments on either side, as it would lead us beyond our prescribed duty; but we will briefly remark that Maupertuis, in a very few words, has shown the fallacy of the very principle and maxim on which the entire doctrine is based. If *actual*, though *infinitesimal* changes be admitted, then is the law of continuity a mere chimera; for, as Maupertuis in substance remarks, the law of continuity is no more violated by a sudden, and tremendously visible destruction of the universe, or any part thereof, than by changes ever so imperceptible to our senses, but *actual* and *finite*. It is manifest that this doctrine of continuity makes God's sublime universe a vast machine, regulated in all its motions, by its own intrinsick principles, and, at this time, wholly independent of Deity; as much so as the movements of a clock are certain, and wholly independent of the will of the mechanist. It also regards the actions of all organized beings, as the mere results of fixed mechanical evolutions. Vice, in this system, is necessary and pre-ordained; and so, likewise, is virtue: man is a mere automaton, no less in the operations of his mind, than of his body: merit and demerit, gratitude and ingratitude, honesty and dishonesty, love and hatred, and, in short, all that we admire, and all that we abhor, are equally the result of the unerring laws of continuity. So odious a doctrine cannot be true. The irresistible dictates of conscience and reason, (when not perverted by vice, or an overweening love of theory, and the being wise beyond what is written,) assure us that neither the principle of the *sufficient reason*, nor the *law of continuity*, ever had existence except in the mind of its erudite, but misguided author.

Thirdly. The doctrine of *Pre-established Harmony* is a figment from the same source; and its design, and general nature, are the same with those of the other two, viz: to sustain the theory of necessity, by establishing a fixed and mechanical universe, in which every mental and physical operation is the result of the certain action of the great machine. This doctrine of pre-established harmony was advanced by its learned author, (in furtherance of the doctrine of necessity,) for two main purposes; *first*, to account for the union or communication between the soul and body; and *secondly*, to account for the apparent communication between the kingdoms of nature and grace, by establishing this harmony between them, so as to make a correspondence between physical evil, and moral evil.

The opinion of philosophers, both ancient and modern, in regard to the first, was that the soul and body do *actually* operate reciprocally on each other. Des Cartes was the first who denied this real union, and contended that the connexion is only apparent; in which God is ever the mediator. Leibnitz, in no degree approving of the former, and only partially, if at all, of the latter, advanced a third hypothesis, in his celebrated doctrine of pre-established harmony, in which he states that a soul is an entity having a *fixed series* of thoughts, desires, emotions, volitions, &c. and that a body is nothing else than a *machine* having also a prescribed number, or fixed series of motions &c. admirably and perfectly correspondent to the chain of thoughts, desires, emotions &c. of the soul. Hence, according to this theory, the soul and body do not correspond because they are united, but they are united because they correspond, by reason of a harmony existing antecedently to, and wholly independently of their union. Thus it is that, if there be an invariable correspondence between the whole series of a soul, and the whole series of a body, a man is thus produced; or, rather, God has brought them

together, not by actual contact or union, not by their operating at all on each other, but that the perfect harmony of the previous relation of the two, has thus associated together all the souls and bodies which have ever existed, and will continue thus to associate all that ever will exist. Under the auspices of this theory, we presume that Leibnitz would have accounted for the various degrees of intellect or intelligence in the world, from a Newton or Locke, to the poor idiot to whom nature hath denied nearly all harmony between his soul and body! He supposes that it is a mere illusion that the body affects the mind, or the mind the body; that the relation is only ostensible; that the harmony which perpetually existed, is only manifested to man, when the soul and body are associated by being called into existence. The harmony is so perfect, that the body moves at the very instant the mind wills, but still without the least relation of cause and effect. This theory has been beautifully illustrated by Leibnitz himself, by Dugald Stewart, Mr. Jaquelot and others. The pre-established relation has been compared to two clocks, so contrived, though wholly independent of each other, that when one *points* the hour, the other shall *strike* it, at the very *punctum temporis*. It has been still more forcibly illustrated by the example furnished by Jaquelot, which is recorded by Leibnitz, and is thus stated by Dugald Stewart. 'Suppose an intelligent and powerful being, who knows, beforehand, every thing that I should order my footman to do to-morrow, should make a machine perfectly to resemble my footman, and exactly to perform all day, whatever I directed. Would not my will, in issuing all the details of my orders, remain, in every respect, in the same circumstances as before; and would not the *machine footman*, in performing the different movements, have the appearance of acting only in obedience to my command?' Both these examples, there can be no doubt,

not only clearly illustrate the theory, but render it sufficiently plausible for the mind to assent to its *possibility*. But were all possible theories, even in any degree, countenanced, we should have many Universe-makers, whose works, however, when they came to be a little more closely inspected, would be found to be but miserable and bungling attempts. The absurdity of this theory, however, was too glaring to deceive even the zealous infidel, and has never been regarded as more than an amusing philosophical bauble, ill adapted to its momentous object. The brief notice of it by Lord Bolingbroke, is only to expose its folly. We give it in his own words. 'Bounce felt pain when he was kicked, if Bounce was ever kicked: and so he would have felt it, if he had had no *body* at all, at that moment. A fair day invited you to walk in your garden, Bounce followed after you, and so you both would have done, if you had had no *souls* at all.' He then adds, 'This hypothesis gives me no horror, but every time it comes into my thoughts, I laugh as if I were at a puppet show.'

Notwithstanding these three much spoken of theories are wholly mechanical, Leibnitz disclaims being a *materialist*. Necessity and materialism usually go together, but are not consequent upon each other. The free agency of man, and his accountability, are doctrines too important, we trust, to be resigned by any one, for such absurd creations of the brain as those of pre-established harmony, the law of continuity, and the principle of the sufficient reason. A theorist who would represent an eternal geometrician as incessantly occupied in the solution of the problem, 'The state of one *monad* being given, it is required to determine the *past*, *present* and *future* state of the whole universe,' must excite our admiration at his fancy, but ought not long to perplex us on a point so vital to morals and religion, as that of man's free will. In concluding our remarks on

these opinions of Leibnitz, we have occasion again to refer to Bolingbroke, whose mind, by the by, is much preferable to his morals, and who justly remarks of erroneous theories generally, that 'The authority may be great, but the greater it is, the more strongly do these examples of error show, how little the greatest, how absurd the wisest, how ignorant the most learned of men become, when they presume to push beyond the bounds that God hath set to human inquiries.'*

(7.) Man's actions Although the establishment of man's imputable, or not. free agency does not, of itself, make him morally responsible for his actions; yet, did we deny him liberty of thought and action, we should not know on what basis to found the imputability of his actions, and, indeed, should be compelled to admit that there can be no such thing as moral obligation. A being, the subject of an uncontrollable fatality, and yet responsible for his actions, is a monstrous and incomprehensible notion. Such a being would be capable of neither virtue nor vice, and consequently entitled neither to reward nor punishment; all ideas of praise or blame must be given up, and man, instead of remaining the paragon of animals, would become, under the influence of such a doctrine, more savage than the wild beast, more miserable than any other creature in existence.

To suppose the soul to be a particular subject on the one hand, and passion a motive power on the other, originally and directly communicated by heaven, and ever acting with a force proportioned to its own quantity; is reasoning indeed from the known laws of matter, but in opposition, we apprehend, to the equally known laws of the mind. A power to choose, and a dependence for felicity on the choice; a power to decide, and a responsibility for the decision; a power to avoid and pursue, and two goals to be sought or

* 5 Boling: Works, 364.

avoided; appear to be correspondent and accordant ideas, fall in with the natural feeling and belief of the human mind, and constitute the foundation of all human institutions, as well as of that imputability of action which forms man's relation with the author of his being, and the only sanction of the natural law. Take away this principle, and you take away the necessity of a discerning intelligence; you destroy the responsibility to heaven, the difference between the loveliness of virtue, and the odiousness of vice, between honour and disgrace; and you abstract the motive to that incessant activity by which we are constantly urged either to obtain the esteem, or to shun the contempt of our fellows; in short, you cast into utter confusion the whole system of human society.

From the doctrine of the imputability of our thoughts and actions, the following important obligation seems necessarily to result, and to stand pre-eminent in the class of our duties; viz. to cultivate with assiduity all the functions of the mind, and to preserve in health and vigour all the powers of the body, since it is by their united action that man becomes useful in every condition of life.

Hence is it that the compound nature of man renders it particularly important that the jurisperit, whose science is based on sound morals, should make himself well acquainted with man's physical and mental constitution. It is from the intimate connexion between mind and body, that men so often differ in their judgment on the same subject; for though morals be ever the same, education, both physical and intellectual, has great sway in rendering more or less acute our moral and mental perceptions. Whatever theory be adopted in regard to the connexion between the soul and body, all must agree in the fact, that the mind is capable of indicating itself only through the medium of the numerous organs or vehicles of the body. If they be perfectly organized, and in a state of healthy

action, the mind will be advantageously displayed, and will indicate itself as a sound and vigorous understanding: whereas, if the organization of the body, especially of the brain and nervous system generally, be not perfect, or, from supervenient causes, be thrown into disarray, the mind will manifest itself either with feebleness, or with irregularity. Not that the *mind itself* is capable of injury or of disease; for this, we believe, can never be the case; but simply that its outlets, or organs of communication, have become disordered, or were originally imperfect. Hence, as we think, a man of genius, or of vigorous intellect, differs from one of plain intelligence, only in the greater perfection of bodily organization. Though mind be altogether different from body or matter, (for we differ *toto cælo* from all materialists,) yet we cannot but regard all minds as essentially the same. God may have given to one man a greater talent than to another; but he has created the difference by giving him the ability to display advantageously his mind, through organs more perfectly adapted for that purpose, than those of another. If, therefore, one man be superior by nature to another, it is not because God has created one mind superior to another, but that he has endued that man with a superior organization; one, indeed, which may perhaps for ever escape the scrutiny of the phrenologist, which eludes the anatomist and physician, and which may often be found equally in the small and feeble body, as in the large and vigorous. We often indeed hear of *mental*, as well as of bodily diseases. Leibnitz admitted them both; but contended that the soul and body, not being united, are wholly incapable of diseasing each other. Hence, according to Leibnitz, if the body be diseased, it could not in any degree affect the pre-established harmony of mental thoughts, desires &c., and so, *à converso*. He, however, gets over the difficulty, we presume, by supposing that disease itself, both of body and mind, is pre-established, and is

only a part of the necessary evolutions of each. We have presumed to doubt the possibility of mental disease, and agree with Leibnitz in one respect, viz: that the mind cannot be diseased by the body; but we cannot agree that the body may not be thrown into disarray by the mind. When the mind appears to be diseased by the body, it is, we apprehend, nothing more than that the mind has been compelled by the disorder of the body to manifest itself through diseased or unfit channels, which gives to us the appearance of a diseased mind. But, parting with this point, it is certain that the legislator, the judge, and the jurist should never disregard the physical character of nations, or even of individuals. They should be acquainted no less with the philosophy of physicks, than that of morals. The map of human nature should be minutely studied; and all its anomalies should be as accurately known to them, as are its harmonies and regularities.

The doctrine of Temperaments, which distinguishes men into five classes, may sometimes lead to error; but, with a judicious mind, it may be advantageously used. By temperaments we mean that classification of mental propensities which has been adopted in almost every age and country, since the days of Hippocrates, and which arranges under five divisions, all the striking peculiarities or idiosyncrasies which have been manifested by individuals. These are now said to be the following, viz: *bilious* or choleric; *atrabilary* or melancholic; *sanguineous* or ardent; *phlegmatic* or dull; and *nervous* or irritable. It is obvious that all these names have been taken from those of certain secretions of the human body, with which these temperaments are supposed to have an essential connexion. That men are often found of these various dispositions, and that individuals may generally, in some degree at least, be assigned to one or the other of these classes, there can be little doubt. It would be foreign to the course I have prescribed to my-

self, were I to enter into an explanation of this doctrine, or furnish examples by which it might be strongly illustrated. Biography and history are full of them, and the works of the physiologists amply set them forth, with all that has been hitherto known upon the subject. To these we must, therefore, refer the student. A neglect of this knowledge, and of other subjects pertaining to man's nature, has often led, we doubt not, to injustice in the making and expounding of laws.

(8.) Society, government, religion, and knowledge congenial to man, and essential to his happiness. From what has been stated we infer that man without society, government, religion and knowledge, would be a very helpless and miserable being; and perhaps less capable of self-protection, and the procurement of physical comfort, than any other animal. It is chiefly from association, the comparison and collision of opinion, reciprocal assistance, and division of labour, that man has manifested himself to be 'noble in reason,' and 'infinite in faculties.' We have seen that man is a social and sympathetic being, as strongly drawn to society, as to the pursuit of mere individual gratification: he has a fund of sensibilities, and a set of passions, which cannot be poured out, except in the assembly of his fellows. He is also, as we have shown, a rational being, endued with the curiosity to explore, and the capacity to understand; and surrounded, on all sides, by objects adapted to excite his curiosity, and to delight his reason. He also possesses a sense of the beautiful and deformed in morals, which at once makes him a judge of the actions of others, and a competitor for their praise; whilst his conscience enables him to pass sentence on all his own thoughts and actions. United to all these, and controlling all, he has a choice and will which are to direct him, both in the pursuit of material good, and in the avoidance of moral evil: and it is evident that none

of these various objects can be pursued, in a degree proportioned to his capacities and inclinations, except in *Society*.

But these social affections, also, would have a narrow range, were they confined within the hut of the savage hunter, or even the small horde of uncultivated communities. Man's curiosity for knowledge would be mightily restricted, were it daily interrupted by the calls of physical necessity. The variety of talents and capacities observable in man, would be absolutely thrown away, were they confined to the same kind of pursuits by the similarity of immediate necessities. It is curious to think that the subtlety of genius which led a Locke into the recesses of the human mind, might, in the savage state, have been wasted in speculations on the game he pursued, or the animals which he tended; and the faculties of an Archimedes have been exhausted in the structure of a bow. It is impossible, in short, to conceive a full theatre for the powers of man, or subjects sufficient for his diversified capacities, except in the situation of a well governed community, where the pursuits are selected with reference to the peculiar endowment of the individual, and where the care of providing sustenance, and comfortable habitations, is left to the more common minds, while the better intellects are left to generalize, to reason, to combine, and to supply their own natural wants, by ministering to what have been called the artificial wants of society, but which are, in reality, the same natural wants and pleasures, elicited by a different situation, and called out in the regular progress of the mind.

(9. What is meant by the natural equality of man; and of the nature of moral obligation. While men are thus compelled to society and its consequences, by the character of their moral and physical nature, they bring with them passions and propensities which, however they may tend towards general good, still require much control. Before man came to feel his own individual insufficiency to minister to his numer-

ous wants, he stood in creation free and independent of every other being. Hence, in this state of man, that is, in the state in which he may be supposed to be, independently of all society and government, all men were equal. Such a state of nature, and absolute independence, import the same thing. In this supposed condition, they have equal rights to life, to food and shelter, to the products of their labour and their skill. The transition of man from this state of absolute freedom, to the state of society and laws, necessarily implies a relinquishment of a portion of this freedom.

Whatever rights he retains after he becomes a member of society, are denominated his *natural rights*, and in regard to these, all men still continue to be equal, in the same degree as they were in a state of nature. But even in a state of nature, the inequality of mental and physical endowments produced a correspondent inequality in the happiness, and actual condition of individuals. They laboured with various success, and the powerful in body and mind must have made their own condition much superior to that of the weak. It may be inquired then, why should this inequality be continued after the establishment of society, and why should government, which is designed for the perpetuation of the comfort of man, so often involve the perpetuation of the evils, and resulting inequalities of the primitive state? The solution of this question is by no means difficult. The natural equality of man is in reality the same in society as in a state of nature, in regard to all those rights which in the main are essential to his happiness. He has relinquished to the society a portion of his natural liberty, in exchange for the publick protection, and various facilities which he otherwise would not have possessed. What he has given up, is only for his own happiness; and though the system of society is often a system of considerable sacrifice, yet, on the whole, it results in an

increase of felicity. Government never was, nor could have been, designed to supply all the insufficiencies of individual character. The indolent, ignorant and vicious would then be the sole gainers by society; for no system of government could have made all men equally zealous, industrious, intelligent and virtuous: these are therefore matters which, from necessity, must be permitted to remain in their original state. In a state of nature, or of primary society, these moral, physical and intellectual excellencies would have been productive of an increase of happiness, and would have occasioned inequality of condition: so, in society, these virtues, in addition to their own good results, are attended with a variety of collateral advantages, which flow from the relation in which their possessors stand to the society at large, of which they are members. But this system of mutual sacrifice and accommodation in society, becomes intelligible enough when we observe the nature of *self-government*, and its intention and effects. Man, as we have often observed, is composed of an animal, and an intellectual nature. As the enjoyment of the latter is impossible without attention to the calls of the former, so the gratification of the sensual appetites, in the measure to which they would prompt us, is destructive of intellectual happiness, and eventually of the powers of physical pleasure themselves. Hence a temperate man restrains his appetites, and finds his compensation for restraint and abstinence, in the general amount of health, that is, the longer duration of pleasure, which they procure him. The same thing takes place in human society and government. Prompted by the same inclinations towards the same objects, we should constantly jostle, did we not bear and forbear, yield and receive, sacrifice and be remunerated; did we not adhere, in short, to some general rules, at some expense of individual and special gratification. It is pleasant to take of the fruits of the earth, and it is a natural right so

to do; but it is speedily found to contribute both to their abundance, and their peaceable enjoyment, that men should have the exclusive property in what they rear and cultivate. So, also, it is a natural right of man to do what he likes, where he does not interfere with the rights of others; but he speedily finds that in society this right must be more certainly and speedily defined and limited: he sees that others are also possessed of this right; hence his experience, and that of the society in general, teach him the necessity of restraining its exercise, would he preserve it inviolate. Men soon discover that restraints are necessary, and to what degree: these restraints grow into general rules; and these rules are what we call the principles of natural law. What we denominate utility, is therefore nothing more than what contributes to happiness, by a more general and certain operation; and it is consequently evident that the distinction which we draw in common speech, between the pleasant and the useful, may lead us into some misapprehensions. There can be but one great end and aim of human actions, and that is happiness. Could the useful and the agreeable be by any conceivable process disjoined; were we told we were to abandon our own felicity, for the sake of producing some effect called utility; we might very justly ask to know by what principle we were called on to make the sacrifice, or in any degree to abridge our liberty. In this, however, providence is consistent and kind: we often sacrifice, indeed, a temporary or partial good; but it is for one more durable and general. We stifle our particular aims; but we thus subserve the ends of society, and thus eventually our own. We sometimes go in opposition to our *private* reason; but it is in compliance with the *general* reason, as it appears in the implied rules, or the positive laws of society.

It is usual to say that all men are equal, or in a state of natural equality: this has two significations; *first*, that na-

ture has given to all men the same rights, and, as far as she has endowed them with the capacity of exercising those rights, they are more or less valuable to their possessors. *Secondly*, that all men remain in society in a state of equality, so far as the ends of government do not abridge their rights, or so far as the positive institutions of society have not, on the principle of utility, made special exceptions. From the foregoing considerations we perceive the foundation and nature of *moral obligation*, and the principle also on which *laws* are binding, naturally and civilly. We have already intimated the just conception of a law, viz. a rule adapted to promote the general good constituted by general consent, and sanctioned by implying in its violation, some injury to that publick good of which our own forms a part. The terms *mos, mores, express custom, manners* and *morals* are thus, in truth, such customs, manners and rules as have been found productive of the happiness and good order of society. To sin against morality, is to do some act inconsistent with these established habitudes of thought and action: to violate the law of nature is another mode of expressing the same thought: to be under a moral obligation to obey the law of nature, is to be under a moral necessity of consulting our happiness by those modes which right reason, conscience, and just experience have found best for that purpose.

It is thus eminently true, in a philosophical point of view, that

‘Virtue alone is happiness below.’

And it is found, over and above all, that the tempers, the restraints, the pursuits, and the tastes which are encouraged or prohibited, as auspicious or hostile to society, exert corresponding influences on individuals. It is the beauty of the moral system, that the end proposed by it, is that felicity which we pursue with so much ardour; when we violate its injunctions, we only mistake the means of pleasure,

which nature hath determined with an unerring exactness. It follows, too, as the consequence of these principles, that we are under the same obligation to obey the *positive* law of the land, as that system which is derived from the custom and implied consent of mankind, and the dictates of right reason, and of conscience.

I shall have occasion, hereafter, to show you by what right the legislative power enacts laws, whether that legislative power reside in a single individual, or in a select number. I will only remark, by the way, that no immemorial usage, no hereditary, or other power of governors, nor any conceivable force, could lay us under an obligation to obey any legislative will, on any other principle than general utility; in other words, the happiness of those who are to be affected by its regulations. The happiness of nations is the only just end of government; and when we remember how intimately government is allied with arts, and with virtue, we shall see it is not only the right, but the duty of nations, to resist bad rulers, and put better in their stead; a solemn right and duty, whose exercise is attended with too momentous consequences ever to be wielded rashly, or without great deliberation as to all its remote, as well as direct results.

I have said nothing of the inherent fitness and beauty of virtue, and the necessity which some philosophers have contended for, of cultivating it for its own sake; a sublime, and perhaps a just notion, which I shall have occasion hereafter to touch on. The foundation on which I have endeavoured to raise the structure of moral obligation, is that of Happiness, or (its other name) Utility.

In the course of the present lecture I have several times alluded to the *State of Nature*: in the ensuing lecture I shall endeavour to explain what is really meant by that phrase.

LECTURE II.

OF MAN IN A STATE OF NATURE.

(1.) Why the state of nature is treated of. **THERE** is no phrase of more frequent occurrence among writers on natural law, than that of 'the state of nature.' It appears to be variously understood by different authors, and has consequently given rise to moral and political opinions of various, and sometimes opposite character. We hear of rights which belong to man in that state; of the 'state of nature' as distinguished from a 'state of society.' We hear of the former as a primitive state of man, which once actually existed, and from which our species gradually emerged, forming, in the first instance, primary, and afterwards, civil or political societies. We again hear of this state as a supposed or fictitious one, imagined by philosophers merely in order to illustrate their doctrines, which distinguish actions *malu in se*, from such as are only *mala prohibita*; or certain rights which are called natural, from those which are denominated adventitious; or finally, for the purpose of drawing a broad and visible line of distinction between those obligations which are due from man to man, independently of all positive institutions and enactments, and those which flow from the laws or compacts of society.

It is therefore important that we should understand the true meaning of this phrase, in order to know with cer-

tainty, what are natural rights and obligations; and that we may be able to correct some misapprehensions which are caused by the use of this term in various or indefinite senses.

(2.) Its various meanings. The student will find, very early in his investigation, that there is (as we have stated) some latitude or uncertainty in the meaning and application of the expression, 'state of nature.' He will naturally inquire, where does this state exist? When did it exist? Does it exist any where at this time? Is it when man is solitary, and wholly unallied? Is it when he has formed the most natural and necessary tie, that of marriage? Or is it when he hunts in company, or when he tills the earth in communities of small size, and without a common governor? To all these modifications of man's existence has this phrase been applied by different authors; with exclusive propriety to none, and, in a certain sense, with propriety to all; since in all these situations man, according to circumstances, finds his natural place.

But the idea attached by the soundest writers on natural law, to the phrase, 'state of nature,' is expressed by none of these conditions of man. It is either that state in which man actually existed before he entered into civil or political association; or, as I shall have occasion to show hereafter, a mere *ens rationis*, a state which never had a real existence, and which is founded by philosophers on the doctrine of *possible relations*, for the purpose of establishing certain important moral truths relative to the rights and obligations of man. We shall endeavour to illustrate this, after we have offered to you some of the various opinions of eminent writers as to the original moral and physical condition of mankind, and the circumstances, sentiments and motives which impelled them to society.

If we adopted the notions of some of the poets, we should believe that men were at first the *mutum et turpe pecus*

they are described to be by Horace; animals scarcely distinguished from the brutes; roaming the forest speechless and companionless; unskilled in the most ordinary conveniences of life; and advancing towards even the most faint civilization, under the conduct of chance, or the slow guidance of experience. Others have presented to us a very different picture, and have described men as living in one wide community, where either the abundant fruits of the earth were in common, or the products of the joint toil were distributed strictly according to the wants of each; and where justice and benevolence were as yet unstained. This has been called the 'golden age,' and is familiar to your classical recollections.

Others, again, have supposed the original state of man to have been that of natural and incessant hostility, and ascribe the formation of society and government, not to the instinctive affections of the race, but to a sort of compromise between their respective hostility and selfishness. We shall show you, from the nature of mankind, from the habitudes that have distinguished man in all ages, and from authentic history, that none of these notions are wholly correct, but that the principles of both love and fear, peace and hostility, have been always alike in operation.

It seems evident, in the first place, that man must originally have been created with his corporeal and his intellectual faculties in a state of maturity; for had it been otherwise, he would have had neither 'strength to procure aliment, nor judgment to have made a proper selection of it.' An equally probable supposition is it, that he had his passions and his sympathies, and hence that he would have been impelled to immediate association. An agreeable and sensible writer remarks, that 'where the natural historian treats of any particular species of animals, he supposes that their *present* dispositions and instincts are the same which

they originally had.* Whenever, therefore, we speak of the natural state of man, we must suppose it to have been one that harmonizes at least with his general nature. Hence, we have good reason to suppose the natural state of man to have been that of society; we cannot suppose him to be otherwise than essentially social, because society is now universal, and man, in whatever condition he be, if of sane mind, evinces a fondness for association with his species. And if we sometimes have found a wild man in the woods, he is so far from being a sample of his species in a state of nature, that he is in fact an anomaly, produced either by inclinations peculiar to himself, or, what has probably been the truth in these cases, from the impossibility of his having intercourse with others.

The state of nature is consequently a social state. Men, from the first, must have been endued with reason, and the faculty of progressive improvement; and there are, moreover, certain circumstances which must have existed, and a certain knowledge which they must have possessed, without being compelled to arrive at them by the force of their own reason; or this noble animal, which now appears destined to an almost eternal progression of improvement, must have perished before he could take the first step. He was, no doubt, instructed in the qualities of food, since he does not, like all other animals, instinctively separate the salutary from the noxious. He must also have had a language already constructed, or he had never proceeded beyond a vocabulary, a mere collection of appellatives and names. He must have been at once taught the utility of fire and vesture, since nature hath neither enabled him to bear all temperatures alike, nor provided him with a natural covering to resist their changes. All these reflections forbid our reducing him to the state of nature, as it is understood by

* Fergu. on Civ. Soc. 3.

those philosophers who regard man, as he now is, as little else than a highly cultivated Pungos or Simea, as Lord Monboddo and others have contended.* Mr. Ferguson has some pertinent remarks on the point now under consideration, which are as follows. 'If both the earliest and latest accounts, accounts collected from every quarter of the earth, represent mankind as assembled in troops and companies, and the individual always joined by affection to a party, while he is possibly opposed to another; employed in the exercise of recollection and foresight; inclined to communicate his own sentiments, and to be made acquainted with those of others; these facts must be admitted as the foundation of all our reasoning relative to man. His mixed disposition to friendship or enmity, his reason, his use of language and articulate sounds, and the shape and erect position of his body, are all to be considered as so many attributes of his *nature*; all these are to be retained in his description, as the wing and the paw in that of the eagle and the lion, and as different degrees of fierceness, vigilance, timidity or speed have a place in the natural history of different animals.'†

This primitive or natural state of man, as a mere brute animal, has been denied by many philosophers; and many poets, historians and moralists have been fond to represent the early condition of the human race in a very different light. They have, as has been already intimated, pictured his primeval state under the emblem of gold, and have attached to it all that is delightful to the senses, and virtuous and desirable in morals. Whilst, therefore, these last have traced the shameful degeneracy of man; the former have been still more minute in delineating his progressive improvement from a state of mere animal sensibility, to the refinement of reason, the invention, use and

* Monbod. Works, 1 vol. book 1, ch. 15.

† Fergu. Civ. Soc. 4.

cultivation of language, the formation of policed societies, and the full establishment of all the various arts known to polished life.

If we search for the facts of these opposite theories, in the history of men and nations, we shall certainly be disappointed. That societies and states have sometimes arisen from very small beginnings, and that others have degenerated from vast attainments, and great moral excellence, to equal illiterateness and vice, is entirely true: but the views of the two classes of theorists we have mentioned, are in no degree connected with, or promoted by this fact; they speak of the original state of mankind, and would have us to believe it to be one of great excellence, or of equal abjectness. With Ferguson we again coincide, who remarks that 'man, in his rudest state, is ever found to be above the brute, and, in his greatest degeneracy, never descends to their level. In every condition, he is still a *man*; and we can learn nothing of his nature from the analogy of other animals. If we would know him, we must attend to him, to his course of life, and the tenor of his conduct. With him society appears to be as old as the individual, and the use of the tongue as universal as that of the hand or the foot. If there was a time in which he had his acquaintance with his own species to make, and his faculties to acquire, it is a time of which we have no record, and in relation to which our opinions can serve no purpose, and are supported by no evidence.'*

Rousseau, in discussing the question of the divine or human origin of language, leaves to others the solution of the problem, whether a society already formed was more necessary for the institution of language, or a language already invented, for the establishment of society. Dugald Stewart, in commenting on this point, remarks that 'the

* Fergu. Civ. Soc. 12.

supposed difficulty arises merely from Rousseau's own peculiar and paradoxical theory about the artificial origin of society; a theory which needs no refutation but the short and luminous aphorism of Montesquieu, that *man is born in society, and there he remains.*'

We are, then, to understand by the state of nature, merely that condition in which men exist while they retain their natural liberty, and acknowledge no common superior; that is, a state contradistinguished from the civil state; and it is immaterial to us whether this state ever had an actual existence or not.

(3.) The state of nature merely theoretical and metaphysical. We shall have but little to say on this topic, in addition to what has been already suggested.

Whether we regard this state, first, as one of bestial ignorance and independence; or secondly, of great illumination, and unalloyed happiness; or lastly, as merely that state in which man is free to act for himself, without subjection to any external control; there can be no doubt that there never was a period in which mankind were in it, as thus severally described. The state of nature so much talked of, is a mere figment of the mind, an imaginary condition of the human race, from which we reason in regard to the rights and duties of man, 'as if such a state had actually existed, and his present condition were one superinduced on the other. This metaphysical view of the subject contemplates man in the abstract, and enables the philosopher to point out his rights and obligations in that supposed state, and how they have been variously affected by the change from the state of nature to that of society, and political government.

(4.) Its metaphysical sense is its only useful one. It will readily occur to the student, that the real, and only useful signification of this phrase, is that theoretical state in which moralists have chosen to consider man; a condition in which he is viewed

as wholly unconnected with government of any kind, but still endued with every mental, moral and physical quality which is now known to distinguish him. That this supposed state may be made the foundation of just and legitimate rules and inferences in regard to man's actual rights and obligations, there can be no doubt, when we advert to the fact that nothing is supposed which contradicts his known nature, but just the reverse. The whole system of natural law is founded on an intimate acquaintance with man's essential nature; and, moreover, there is nothing unphilosophical in deducing rules of action from what would be the duty of man in a given state. Montesquieu has a pertinent remark which will illustrate this point; it is this. 'Before intelligent beings existed, they were *possible*: they had, therefore, *possible relations*, and consequently *possible laws*. Before laws were made, there were relations of *possible justice*. To say that there is nothing just or unjust, but what is commanded by positive laws, is the same as saying, that before the describing of a circle, all the radii were not equal.'*

It is also very evident that every human art has its own principles, which are properly called the science of that art: thus, the optician's handicraft is an art; the principles on which his glasses and telescopes are constructed, are the science; and all these principles would have been equally true, had a glass never been made, nor the various lenses &c. so combined as to form a telescope. The angle of incidence would always have been equal to the angle of reflection, had a mirror never been cast, or had a surface sufficiently smooth to reflect a ray, never existed. In the same way, the laws of nature would have been equally true and existent, had never an individual subsisted in a state of nature, or, indeed, had man been created in full maturity, and

* Mont. Spi. Laws, book 1, page 2

in society, his actual nature being, however, the same as we now know it to be.

So, likewise, we are accustomed to speak of things as *just* and *unjust*, and of the rules of *perfect justice*. But justice is itself an abstract and metaphysical idea, totally independent of its *actual* existence among mankind. If we spoke of justice only as it subsists, and is practised among men, we should recognize a very different idea from that which is presented to us by the phrase, 'perfect justice.' This may lead you to a clear idea of what philosophers mean by their constant reference to a state of nature, and to natural rights; it is the supposed condition of individuals *un-united*, and their *possible relations*. Mr. Plowden, in his *Jura Anglorum*, remarks on this subject, that the qualities and properties of this state bear the same analogy to the actual state of man in society, as the principles and properties of mathematicks bear to practical mechanicks: but Mr. Locke, in his *Treatise on Government*, though he describes this state much to our mind, seems to speak of it too much as one of actual existence, and, like most who have treated the subject, has not been sufficiently careful on this point. 'To understand political power right,' says he 'and to derive it from its original, we must consider what state all men are naturally in; and that is a state of perfect freedom to order their actions, and to dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will, of any other man; a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should be equal one among another, without subordination or subjection.'* We have quoted this

* Locke on Gov. 168.

passage, as it contains a clear description of the supposed state, though its learned author has not adverted to it in this light.

As a perfect state of nature would be that in which men exist without any positive law whatever, so the furthest possible removal from it would be that wherein every rule of duty, and dictate of conscience, was enjoined by positive laws, and all natural liberty given up, and then portioned out by the political rule; a state of which it is as impossible to conceive the actual existence, as it is that of the other extreme, a perfect state of nature.

When, therefore, writers speak of the transition of man from the first, to something approaching the second of these states, they do not mean us to imagine that this was at once a complete transition, made at a single point of time, but a gradual change of ages, more or less progressive however, according to circumstances. Men must be presumed to have parted with their natural rights precisely in proportion as they entered into durable social conventions, and agreed to the establishment of permanent rules: but as the occasions of these positive enactments could only arise gradually in the various modifications and events of society, so it is obvious that in the mean time the law of nature retained its force, and the state of nature (so far forth) its existence. Even at this day, therefore, individuals are in a state of nature, and are directed by the laws of nature, in every thing that regards such rights, and their enforcement, as have not been modified by the positive or implied laws and institutions of society. This may be easily illustrated by examples; for instance, the rights of Extreme Necessity, and of Harmless Profit, are based on this principle. The former occurs under a variety of circumstances, as, for example, in the case of *self-defence*, which is justified and regulated by the law of nature, and the individual exercising it, is *pro hac vice* in a state

of nature. In this case civil subjection ceases either in *fact*, or of *right*, and the arm of the civil power being incompetent to afford relief to the individual, he is remitted to his original state, and must be guided therein by the only law of that state. Under this right of Extreme Necessity, we may appropriate the property of others for our immediate relief, and to prevent starvation, if there be no other means of warding off that calamity. So, also, in a storm at sea, we may cast overboard the property of others for the preservation of life, or to remove a difficulty which might jeopard it. In some instances we may even inflict death for the preservation of our life or property; a woman may slay him who would dishonour her; a husband or a father is justified in killing one who attempts to dishonour his wife or daughter. In all of these cases, where it is supposed that we should wait in vain for the aid of the civil power, we should be satisfied, however, that the jeopardy exists, and that all relief is absent. Jurisdiction and subjection having then ceased in fact, we are restored to a state of nature, and to the rights and protection of the natural law.

The right of Harmless Profit, if it exists, is the right of using another man's property for our benefit, when it can be done without prejudice to the owner.* It is contended by some that this is a right of nature which has never been relinquished; that originally all things being in common, the institution of property was only to answer certain purposes, with which the right of harmless profit is not at variance, as it benefits those who claim it, without prejudicing those of whom it is asked. It is plain, however, that such a right must be theoretical only, for in practice it is so precarious as to render it doubtful if it can be classed among rights of any kind. It is admitted

* 1 Rath. Inst. book 1, ch. 5, s. 8.

that the proprietor is the sole judge of the extent to which the right shall be exercised; and a doubtful right, to be used only to such an extent as others shall dictate, can be of little value.

It was at one time supposed in England, that the right of harmless profit was sufficient to sustain what in that country is called the common law right of *gleaning*, and which consisted in the privilege claimed by the necessitous and indigent people of a neighbourhood, of entering on the fields, after harvest, and gleaning therefrom the scattered remains of corn and straw, which had escaped the gatherers of the crop. The practice is an ancient one in other countries as well as in England, and has been referred not only to the *jus naturæ*, but to the humane provision of the Mosaic law.* The validity of this right has been twice the subject of legal adjudication in England, and in both instances the right has been denied; so that it is no longer, if it ever were, a part of the common law of that country.† As a natural right, its existence is doubtful; as a Mosaic institution, it is not at this time obligatory; and as a common law right, it was never legally sustained.

So, also, this *status naturalis*, and the principles of natural jurisprudence, may be said to exist for many purposes between nations. International law is said to be based on the law of nature; a large portion of the *Jus Gentium* is nothing more than the *Lex Naturæ* applied to nations, considered in the light of individuals in a state of nature. As there is between nations no common superior, no general tribunal to which an appeal can be made to settle differences, the great code of natural law is the only one which can be resorted to; and to enforce its decisions the nation interested in its maintenance, has no other means

* Levit. ch. 19, v. 9, ch. 23, v. 22.

† *Steel v Houghton*, 1 Henry Blackstone's Reports 53. 3 Black. Comm. 212.

than the compulsory one of war. Independently, then, of treaties, and acknowledged customs and usages between nations, there is no other rule of conduct than the *jus naturæ*. Hence, the relation which subsists between nations bound by no treaties, is almost identical with that which would exist between individuals in a state of nature.

But to return to our inquiry whether a state of nature ever had an actual existence. There can be no doubt that if this perfect state ever existed for a short time, it was broken by the very first pair of human entities, since even they were speedily controlled by a law, or something equivalent thereto. Mr. Plowden remarks that 'it is incontrovertible, that the only individual who can be said in any sense to have existed in a state of nature, was Adam before the formation of his wife.' But, if the inquiry be worth pursuing to so remote an age, and as to individuals so peculiarly circumstanced as were our first parents, it appears to us that Eve also was in that state, during that instant of time before she was subjected to the authority and law of her husband. Nay, further, as a convention or contract is not strictly a law, and as the wife was not subjected to her husband until after the fall, by the command, or rather punishment of God, the state of nature as to both, might be said to have continued until that period, which, although a *punctum temporis* when compared with the ages which have since elapsed, was perhaps a considerable portion of their own existence. Be this as it may, for we have no means of ascertaining the period which elapsed between the creation of Eve, and the fall, that period, whether short or long, must have been a state of nature, since the wife did not become, till after the fall, subjected to the law of her husband. But if Adam were in this state, and Eve also until she became subjected to him, it would not contradict our previous assertion that a state of nature never existed, and is a merely theoretical state, presumed by writers on

natural law, for certain useful purposes. For in speaking of this state, whether actual or supposed, we must be understood to refer altogether to a state in which *mankind* were, and not to that of two individuals circumstanced as Adam and Eve. No advantage could result from ascertaining the fact of such an actual state of nature, and, consequently, we may correctly assert that that state is wholly imaginary, although it should be proved that our first parents were in it for a time. Viewing the question in this light, it is quite obvious that this state is merely hypothetical, as there are many rights which are correctly termed natural, and yet could never have been exercised in a state of nature even such as that of Adam, before or after the fall, or, indeed, in such a state of nature as Hobbes contends for, in which great numbers of human beings existed at the same time, but wholly separate and independent of each other. Men, for example, have a right to the obedience of their children to a certain age, and to their tenderness and gratitude at every age: they had this right as perfectly before any children were born to them, as after; and yet in either of these supposed states of nature, they had not the actual exercise and enjoyment of it. Without this understanding of natural rights, those rights, the broadest and the most comprehensive, would be narrowed to an insignificant catalogue: they are not the less natural rights, because neither exercised nor enjoyed; it is sufficient if they be clearly ours when circumstances occur in which they may be actually enjoyed. Hence we are led to another and much broader idea of the natural law, viz. a system of rules of action suitable to promote the greatest utility to man in all stages of his being; an abstract perfection, after which legislation labours in all modifications of human existence and society. You will find, indeed, this abstract standard constantly appealed to in all disquisitions concerning human rights and duties. As men are presumed to

depart from their natural state only with a view to the enjoyment of a better, and as they only relinquish a portion of their rights, or modify them, in order that they may enjoy the remainder of them the better, we naturally seek to ascertain how much we are really obliged to give up, in order to secure the balance. When, therefore, we form the constitution or laws of a society, we decide what portion too much of our natural rights is demanded of us in return for their protection; and we are accustomed to say they *invade* so much of the natural rights of man; not those rights only which actually existed in a state of nature, but those which we are still entitled to enjoy, after deducting those whose relinquishment is essential to the establishment, the conservation, and the peace of well regulated society.

From all that has been said, we think that writers on natural law have not been sufficiently explicit in stating, that the so much spoken of 'state of nature' is a merely hypothetical one; and that their neglect in this respect has been the cause of some serious practical errors, and false principles, in regard to our rights in society, and the true relation which subsists between those who govern and are governed. To these mistaken notions are we, in part, to ascribe some of the doctrines of revolutionists in all ages; the opinions of the Illuminati, and Jacobin demagogues throughout the world, who from design, more frequently than from ignorance, have endeavoured to confound the two states together, or to transfer the properties of the state of nature, whether actual or supposed, to the state of society; an amalgamation impossible to be made, and ever fraught with the most alarming mischiefs.

(5) Whether the state of nature be one of war or of peace. The ingenuity of philosophers has been much excited to know whether this state, if actual, were one of peace or of war. The establishment of a common superior, or chief magistrate, must have been with the intent to remedy some evils,

or to improve some advantages; and it is a curious question, not entirely devoid of profit, whether it was most in the pursuit of good, or in the avoidance of evil, that these infant associations were formed.

This controversy was first started by the celebrated Thomas Hobbes, in his treatise *De Corpore Politico*. The character and opinions of this distinguished man were precisely such as we should expect to find in one who argued with learning and gravity the point we have now under consideration, and decided it in favour of the natural hostility of man against man. Mr. Hobbes's philosophy may be very briefly summed up as follows. He asserts that by the law of nature, every man has a right to all things, and over all persons; his maxim being, *Natura dedit omnia omnibus*: that the natural condition of man is a state of war, a war of all men against all men: that every one acts reasonably who endeavours, as far as possible, to master all the persons of others, till he sees no power great enough to endanger his own: that the *civil laws* are the only rules of good and evil, of just and unjust, honest and dishonest, and that antecedently to such laws, every action is in its own nature indifferent: that there is nothing good or evil in itself, nor any common laws constituting what is universally just or unjust: that all things are estimated by what every man judgeth to be fit, where there is no civil government, nor any law to regulate conduct: that the power of a sovereign is necessarily absolute, and that he is not bound even by any compact, however solemn, with his subjects: that nothing which a sovereign can do to the subject, can be called wrong or imperious: that a sovereign's word is sufficient to take any thing from any of his subjects, if there be need so to do, and that the sovereign is the exclusive judge of the necessity, his fundamental maxim in this respect being, *Non veritas, sed auctoritas facit legem*.

The foregoing is a faithful, though a very brief epitome of the gloomy philosophy of this extraordinary man.

Notwithstanding these bold and, we venture to say, absurd doctrines, the philosopher of Malmesbury has been regarded with great veneration by the learned generally, and has had many advocates, or at least friends, who have endeavoured to prove that he has been either misunderstood, or grossly perverted. Others, again, have adopted some of his sentiments with a zeal fully equal to their master's. His doctrine as to the natural hostility of man against his own species, has certainly had many opponents, but it has also not been without its supporters. Mr. Hobbes goes on the hypothesis, in the first place, that men must originally have existed in great numbers at the same time; a supposition highly improbable, not conformable to the general opinion, and unsustained, not only by the general history of the infancy of mankind, but by that record which, if even not divine, is entitled to high consideration; but being divine, is conclusive on the subject. Taking this writer, however, on his own grounds, his position is mere assertion, and his inferences from that assertion are, as we hope to prove, not even plausible, much less true. Before we proceed to the further examination of this point, it is proper to remark that the phrase, 'state of nature,' has been used in three distinct senses, so that what may be predicated of the one, as to its being a state of war or of peace, may not be applicable to the other. In the first sense it means nothing more than the natural disposition or tendency of mankind, considered as beings compounded of reason as well as passion; and is that state which it is believed would be the most consentaneous to the nature of man abstractly. This is a meaning wholly synonymous with the expression, 'natural character of man,' and, in truth, does not import a *state* or *condition* of the species, nor refer to the fact whether mankind were associated or not; or, if associated,

whether it were in mere primary societies, or in those of a political nature. The second meaning of this phrase is the usual one, viz. man's actual or supposed primitive condition, without society of any kind; and the third imports his like condition in a rude or primary society, but without any superior, government or laws. In regard to Hobbes's opinion, no difficulty can arise from this threefold meaning, since his doctrine covers the whole. He contends that in all, or either of these meanings, the state of nature is one of war; that man's natural tendency or character is that of hostility against his species; and that this is equally the case whether he be solitary, and wholly unallied, or in a state of primary association. There are various philosophers who have partially adopted the views of Hobbes; among the rest we find Mr. Dagge, a learned and sensible writer, who, notwithstanding various qualifications and nice distinctions, (as if ashamed to go all lengths with the philosopher of Malmesbury,) has, we think, so far adopted his hypothesis as to be responsible for its absurdities and its mischiefs, if there be any. Mr. Dagge admits the general pacific nature or character of man, and that if the first of the meanings we have stated, be applied to the question now under consideration, then the state of nature is undoubtedly pacific; but, singular as it may appear, he still concurs fully with Hobbes in regarding the state of nature as essentially hostile, when the question is applied to either of the remaining acceptations.

As we think that Mr. Dagge has conceded too much, and indeed nearly every thing to Mr. Hobbes, in admitting the state of nature to be one of war, when we mean by that state, man's condition without society or law; and as we also believe that he has involved himself in extreme difficulty, if not contradiction, when he allows man's natural tendency to be pacific, and yet contends that his primitive condition is that of war; we shall be excused if we state

his views in detail, and make such comments on them as may enable you clearly to perceive the difference between the opinions of Hobbes and Mr. Dagge, and also to detect the fallacy of the entire argument of the latter writer.

If we are to understand by the state of nature nothing more than man's condition when wholly without society and laws, either civil or political, then, says Mr. Dagge, 'it is difficult to conceive how such a state can be one of peace, for though it be admitted that men in general are pacifically inclined, yet the few who are guided by their passions, would necessarily involve the rest by turns in disputes with them.' He further remarks, that 'whenever there is no common tribunal to which the contending parties may appeal, and submit their differences, there the decision must be by force, and such a state may properly be termed a state of war, in which every one retains his private right of redress and revenge.'

In reply to these observations, we have occasion, at this time, only to remark, that they are liable to the common objection of proving too much; for if the mere fact of the right of redress remaining with individuals in a state of nature, be sufficient to characterize it as a state of war, then must the relation or state subsisting between nations, be equally and essentially a state of war. Each nation, in the great collection of nations which divide the human family, possesses the same right of redress and revenge that is attributed to every individual in a state of nature. Nations have no common tribunal; they are in a state of nature, as much so as are individuals when without society and law; and consequently all nations must be regarded, at this time, as essentially in a state of war, as far as that state has not been modified by treaties between them, which indeed, on the basis of this theory, can scarcely be deemed sufficient to relieve even those thus allied, from the imputed state of war.

Puffendorf has argued this mooted question against Hobbes, and so has Grotius; the first observing, that the causes which, according to Hobbes, render men offensive and hostile to each other, are mostly of a particular nature, and consequently not of such universal influence as to make all mankind hostile to each other, and at most, could only set a comparatively small number of individuals at variance; while Grotius thinks that men may live peacefully in a state of nature, if they live in great simplicity. To these views Mr. Dagge has made several objections, to which we shall presently advert. Montesquieu also sides with Grotius and Puffendorf, and contends, in opposition to Hobbes's theory, that man in a state of nature would, first of all, think of the preservation of his own existence, that he would immediately become sensible of his weakness, and that his timidity would be excessive. To sustain himself in this idea, he cites the case of the savage youth who was found in the woods of Hanover. We have hastily referred to these weighty names, as the most distinguished among those who have contended against Mr. Hobbes: our time will not permit us to give even a summary of their views. This would be the more unnecessary, as we do not entirely concur with them, and shall have occasion to dwell perhaps too long on the point, in examining more particularly the doctrines of Mr. Dagge, who endeavours to strike out a new distinction, when there is no real difference, and who, we think, is more likely to mislead young minds on this subject, than even the learned author of the theory. The question under examination is, in the abstract, of no great importance; but as it involves, in its extended consideration, a great variety of topics of great interest in the natural law, we shall be excused if we are unwilling yet to part with the subject.

Is the 'state of nature,' in any sensible use of that phrase, a state of peace or of war; that is, do the propensities of

mankind in that state, decidedly preponderate to love and kindness, or to hatred and revenge towards their species? If we look at the primitive condition of man, as it is recorded in the Scriptures, and which is indeed the only intelligible account we have, in the form either of history or of hypothesis, we shall find that the human race, however diversified, are the offspring of a single pair, endowed at first, and even after their fall, with the qualities requisite for their preservation and improvement, and attached by natural ties to the protection and instruction of their offspring, who, in their turn, bestowed a similar attention on their own. The state of nature therefore had, in one sense, an existence for scarcely a moment; not longer than while the first pair of human beings were deliberating, if indeed they did deliberate, whether they should yield to the instinct within them, and rush into the first embrace. Their children imbibed from them the habit of obedience, and learned the duty from the necessity of it; and when they separated from the parent stock, and carried with them their progeny into other districts of the forests, they did not carry with them independent individuals but families, who gave obedience for sustenance and affection, and between whom and themselves there existed a state of society as complete for all its purposes, as are the most complex governments for theirs. Does society imply numbers? we answer, only thus far, that there shall be some to govern, and some to obey, and the primitive families had these. Does it imply a governor? it was to be found in the father of a primitive family. Does it imply a contract? it was complete between the parent who had reared, and the children who had been nurtured, for many years. Does it imply laws? the various relations of a family would speedily teach and enforce them, because of the daily necessity for rules even in the least numerous, and best affectioned of these miniature societies. Does it imply sanctions? these existed in the

natural affection which the children bore towards their parents, and in the necessity of sustenance, which they were to derive from those whose skill and labour could procure for them, what their own were inadequate to obtain. From the foregoing view, which might have been greatly extended in order to show how similar must have been the primitive condition of man to those subsequent associations called nations, or civil societies, we clearly perceive that under any plausible view of the origin and progress of man, it is neither just nor logical to assume the preponderance of any *one set* of affections, of fear, hostility, pride, arrogance, &c. on the one hand, or of love, sociality, sense of weakness, gentleness, &c. on the other; that is, in other words, to suppose that the state of nature was a state either of exclusive war, or of exclusive peace. Whether we regard men as originating and existing in the mode we have just deduced from the Scripture History, or take the theory of Hobbes, and imagine them subsisting in large numbers at once, we still contend that it cannot be justly maintained that they would be actuated by one set of predominant passions. We believe, on the contrary, and the opinion is justified by all subsequent history and knowledge of our species, that they would be actuated by various and very opposite emotions, according to circumstances; that they would love and hate, be pleased and angered, be at peace and in broils, as they had abundance or deficiency of food and shelter; according as they were thinly or thickly established in particular spots; and, mainly, according as they were attracted by congenialities of temper and pursuits, which we know are the most apt to link men together through all difficulties, which make them deny themselves, out of mutual affection, even of the first necessities of life, and which cause them to think, more especially where the sexes are different, that no privation is too much, so that they can enjoy the comfort of a society of their own selec-

tion. This point then, so much vexed among philosophers, appears to us to resolve itself into a simple question like the following. If two individuals of the human race, with their powers of reasoning in operation, though without knowledge, and with their natural qualities of heart unvitiated and unbiassed, and who had never seen society, were to meet together on some desert island, would they view each other with distrust and hatred, or come immediately into habits of affection and intimacy? Would neither of these individuals, (according to Hobbes's philosophy) ever rest until one or the other had not only subdued surrounding nature to his sovereignty, but conquered and enslaved the only one of his species he had ever seen, or was likely to see; and after gaining the mastery, would the victorious individual, (adopting Hobbes's favourite maxim, *Non veritas sed auctoritas facit legem*,) feel himself under no obligation whatever to the man he had subdued, and, forever suspecting him of treachery, be always alert to preserve an equal measure of rigidity towards him, lest he, in turn, should get the ascendancy, and exercise it in the same way, as of right he may, according to this sullen philosophy. Or, again, the question may be thus modified. Does our knowledge of the natural dispositions of mankind justify the opinion, that persons thus situated, would be more apt to disagree, and to assert their respective desires by resort to force, than to harmonize, and live in peace? In settling such a question, an abstract one in itself, it would clearly be improper to allow any thing for peculiarity of disposition: the two supposed individuals must, in this question, stand as the representatives of the human race, and their conduct on such a meeting, must be concluded to be that which seems natural from our acquaintance with the human character. Now, if there be any quality which particularly distinguishes mankind, it certainly is sociality. Other animals, as was shown in the pre-

ceding lecture, though they meet in companies, are merely gregarious, not rising to that strong, constant, and yet selecting quality, which we term sociality, and which has characterized man in all ages, and under all circumstances. If communities are small when men are in the infancy of agriculture, or are yet herdsmen, it is not because they are antisocial, but because their means are small, and they must remain separate to have enough. If they are smaller yet when they are hunters, it is owing to their means of subsistence being still more restricted, and, consequently, to their requiring a proportionably wider surface of country to supply them. We conclude, therefore, that men associate from a feeling which is in a great degree instinctive, namely the social principle, and are only separated by circumstances.

To say, because this state of association is sometimes interrupted by competitions, and even contests, that the natural state of man is one of warfare, is, we think, no less unkind than illogical. The two individuals whom we have supposed, would, it seems to us, be irresistibly attracted to each other, even if they were not of opposite sexes: they would seek their food, and eat it together: they would league themselves against the beasts: they would explore together the solitudes, in order to enliven their dreariness: they would, in short be mainly dependent on each other for comfort and cheerfulness; and if they disputed sometimes about the division of their food, the direction of their wanderings, or the place and time of rest, these collisions would be mere episodes in an existence, the principal charm of which would be drawn from an intercourse of thoughts and sentiments, which would not be surrendered for interests comparatively so unimportant to their happiness.

The foregoing observations will, it is hoped, enable us to see more clearly the fallacy of Mr. Dagge's views. Though he declares the doctrine of Hobbes to be a baneful

one, he in reality very nearly coincides with him. After endeavouring to impugn the views of Grotius, Puffendorf and Montesquieu on this subject, he contends that, as they consider only the *general* nature of mankind, their argument is no way decisive of the question in controversy! a conclusion, by the by, the very reverse of what we suppose most men would draw. 'But admitting,' says Mr. Dagge, 'the greater part of mankind to be social and pacific, yet it will not therefore follow that a state of nature is not rather a state of war than of peace. The selfish passions of a few would not, it is true, involve the whole species *simul ac semel* in a state of war; but these selfish affections will operate so fatally, that all, in their turns, will feel their direful effects, and the most mild and pacific will *vicissim* be involved in hostilities, even in their own defence. The seeds of contention are inherent in our nature; consequently, as occasions of disagreement increase, hostilities will multiply.' 'Again,' says this author, 'if by a natural state we mean such a state as is most consentaneous to man abstractedly, men would be, in such a state, rather inclined to peace; but if we speak of a natural state, as contradistinguished from a social or civil state, it appears to be rather a state of war, though the members of such a state may not continually be at enmity, or waging war.'

We have now stated to you very fully, from Mr. Dagge's work, all that is necessary to possess you of his peculiar views and distinctions; and we cannot help regarding them as disingenuous and sophistical throughout. The question for solution really is, whether man is by nature a being inclined to associate with his species, and to live in peaceful communion, or is one whose dispositions lead him to prey upon his kind, and to domineer over those whose physical and mental inferiority renders them unable to protect themselves. The point is one which regards the character of the *species* only, and not merely the vices or the virtues of

the few, to which Mr. Dagge, by a strange departure from the real point, would seem to restrict it. The general and pervading character of mankind, therefore, must be decisive of the question, and, consequently, the fault found by Mr. Dagge, with Grotius, Puffendorf and Montesquieu, in having rested their opinion on the acknowledged pacific character of the *species*, so far from being a fault, or indecisive of the merits of the question, is, according to our apprehension of it, the only solution of which it is susceptible, and the only point, in fact, worth contending about. Our author's concession of the general pacific nature of man, appears to us an abandonment of every comprehensible ground on which he and Hobbes would rest their argument; and the distinction taken by the former, viz: that if by the state of nature is meant that which is the 'most consentaneous to man abstractly, it is a state of peace;' but if it mean 'the condition of men while they retain their natural liberty, and are without government and laws, it must be a state of war;' appears to us wholly destitute of foundation and utility. If Mr. Dagge be at a loss to 'conceive how such a state can be one of peace,' might he not have been equally at a loss how to conceive it a state of war? By *status* or state, as applied to the present subject, we surely do not mean an occasional condition, but a preponderating one, flowing from a general operating principle. How, then, men in general can be admitted to be pacifically inclined, and yet the natural condition of man be that of hostility, we confess we are at a loss to comprehend. It is obvious that Mr. Dagge has mistaken the real point of controversy; or has confounded the partial causes of occasional hostility, with general or pervading principles, which would induce the *status* about which alone is the controversy at all concerned. This was unquestionably the meaning of Mr. Hobbes; so his opponents have ever understood him: for if by a state of peace, or a

state of war, we mean one never interrupted by any contentions in the one case, nor by any friendships in the other, undoubtedly the state of nature can never, (as we have shown from the mixed character of man) be either a state of peace or of war. But if, on the other hand, we mean by the inquiry, nothing more than to ascertain whether the dispositions of mankind are more generally hostile than peaceful, we conceive that the daily contemplation of man even in his rudest condition, and the tenor of his whole history, will justify the conclusion that he is naturally disposed for society, the love of his species, and the cultivation of the blessings of peace; and that the numerous contests and wars, both private and publick, which figure so largely in the history of our species, no more prove the natural proclivity of our race to war, or that our natural state is that of enmity against one another, than do the occasional miseries of man, his diseases, or his too frequent manifestation of bad passions, prove his natural state to be wretched, or full of physical disease, or moral evil. There is, we know, too much of all these evils; but these, we apprehend, are his *unnatural* and partial states; we know how they have been superinduced, and no one ventures to assert, and none can believe, that our natural condition is other, generally, than that of happiness within our control, health within our means of enjoyment, and virtue at our option: and, finally, that if the vices have too often triumphed over the virtues, still man does not find his natural condition among the former.

Again, (if we are not pressing this topic too far) we may place it in yet another light. The enjoyment of society, the acquisition of property, and the cultivation of the understanding, being the primary objects of mankind, they can have no general dispositions inconsistent with the obtainment of these, although their vices and their ignorance may sometimes interfere with the pursuit of these goods.

It must be allowed, then, that the views of mankind being, in the main, directed towards these ends, their conduct will be shaped, in the main, by the principles best adapted to insure them. It is folly, therefore, to imagine that man, who desires the society of his fellows, who is anxious to reap in security the fruits of the earth, and to receive the products of his labour, and who loves both to communicate and to receive the results of observation and experience, is naturally prompt to that state, which, of all others, would most effectually defeat the whole of these ends. His case is entirely different from that of solitary and predatory animals, (and even these war not on their own species habitually) whose enjoyment is retired, who have no thoughts to communicate, and who cultivate no fields with a view to bring their fruits to maturity. Men do not argue from a few contentions among beavers, that they are hostile to each other, when they find them constantly associating, combining their labours for a common end, and then enjoying their results generally in peace and system. If we refer even to the innumerable contests of the most savage tribes, we shall find a confirmation of these principles; since we never heard yet of a war undertaken for the pleasures which it bestowed, but rather for the protection or revenge of invaded rights, and only sometimes with the view of plunder. No argument can be stronger than this, to prove the natural sentiments of mankind on this point, and that the species cannot be justly charged with the wicked desire of waging war merely for each other's subjugation or destruction. Again, if it has been urged on the one hand, that the necessity under which men found themselves of leaguings together in societies for the preservation of peace, is an argument that the state of nature was one of war, since otherwise there had been no necessity for such combinations for mutual protection; it may be replied with equal justice on the other hand, that had not their dispositions

been really pacifick; had not peace been greatly preferred, and been their real object and delight; they would not have resorted so universally and steadily to these pacific associations; to say nothing of the numerous other ends, besides mere protection, which were answered and promoted by civil societies. In short, if the notion that this state is one of war, mean any thing more than that the peaceable tendencies of mankind were often interrupted by contentions, (a point never denied) it must seem a paradox that men should rush to civick associations, in order to avoid that which their nature coveted, and to control the very dispositions in which they were the most prone to indulge. It seems, therefore, very clear that, unless the tempers of the majority, and a considerable majority too, had been pacifick, the lawless and violent inclinations contended for by Mr. Hobbes and others, would for ever have sundered mankind, or brought them into no closer combination than is necessary among hordes of handitti. We have considered this subject more in detail than some may think necessary; but it is not without its practical uses, and in an outline of ethical and political law, a controversy of so much celebrity could neither be omitted, nor slightly passed over. From what has been said on this point, you will no doubt agree with Plutarch, that 'man is by nature neither a savage nor an unsocial creature, and that when he becomes so, it is by vices contrary to his nature;'^{*} and also with Vattel, that 'man necessarily stands in need of creatures like himself, to preserve and perfect his own being.'[†]

(6.) Of the inconveniences and miseries of the state of nature.

That the state of nature, had it ever existed, would have been productive of infinite wretchedness, and have speedily tumbled into confusion, is extremely obvious from our knowledge of human nature. Whatever the pacific dispo-

^{*} Lang. Plut. 'Pompey.'

[†] Vattel, ii. 5.

sitions of the many, the few would frequently have plunged them into discord: whatever their desires after utility and enjoyment, the wrong judgments of some vigorous individuals would frequently have interfered to thwart their progression towards it; for as the universal concord of men would have been necessary for either of these, so, unhappily, the dissent of a few would have been enough to mar, and sometimes to destroy them. Men, therefore, would speedily find the necessity of society, and its advantages would continue to ensure its endurance. The inconveniences of the state of nature can be well imagined, and need not be further remarked on; they appear in high relief when contrasted with the blessings secured to us by society and laws.

Before we proceed to trace the origin and various motives, actual and imaginary, which gave rise to society and government, we propose to direct your attention to the rights which appertain to the state of nature, which we have just considered; and these natural rights will form the subject of the ensuing lecture.

LECTURE III.

OF THE RIGHTS OF NATURE.

WE are now to speak of those rights which belong in a state of nature to every human being; which appertain to man for his preservation or happiness; and which are so essential to his well-being, that they may be said to belong scarcely more to man than to all God's animated creation. These rights remain with us in society, where they are so guarded and modified as to produce the greatest happiness, by averting the evils to which we were liable in a state of nature, from their unrestrained and injudicious use. The rights of nature, in common with all others, regard either a man's person or his property; for even in a state of nature, property may be acquired; and in that state the inviolability of person was as essential, and as much a right, as it now is in civil society.

Before we proceed to examine the various rights of nature, it is proper that we should have a clear understanding of the true import of the word Right.

(1.) Various meanings of the word Right. There are few words in any language which have been more variously used and defined than this word. It appears in the form of substantive, adjective and adverb, and is supposed to have not less than forty meanings. We shall note a few of them, and endeavour to bring within a small compass the substance of what may be found repeated in a

variety of forms, perhaps in every volume, ancient and modern, which treats of morals, law, divinity, metaphysics, or even criticism; each author, without fail, taking up and explaining this word Right. Our notice of it, therefore, is merely to afford the student a foretaste, and by no means to philosophize extensively on it, since perhaps, after all, every man understands its import nearly as well intuitively, as it were, as he does after even the most critical examination of its etymons and meanings.

1. The word Right is sometimes used to signify *law*.

When we say, for instance, that natural right requires us to keep our promise, to restore what we have purloined, or to refrain from murder, we mean natural justice, the natural fitness of things, or, in other words, natural *law*. It was used in like manner among the Romans, who recognize this in their word *jus*, which signifies, not only *right*, but *law*: thus they say *jus gentium*, or law of nations; while the same word, in other cases, imports the same as our word Right; as in the phrase, *jura personarum*, the rights of persons.

2. The word Right sometimes means that *quality of our actions* by which they are denominated just or lawful; though it is more usual, when this is our meaning, to say the *rectitude* of our actions. The moral rectitude or rightness of an action is its conformity and consistency with moral rules, whether natural or positive: we say conformity *and* consistency, for it is justly remarked by Grotius, that not only such actions as are conformable to what the law commands, but likewise such as are consistent with it, and not forbidden by it, have right or rectitude; for it is plain that all actions are lawful which the law does not forbid. In short, right or rectitude, in this second case, means the quality of being conformable to, and consistent with law.

3. The next sense in which this word has been used, is that which we attach to it when we speak of the rights which we enjoy either in a state of nature, or in society. It is then not a quality of *actions*, as in the preceding case, but of *persons*, which makes it just or right for them either to possess certain things, or to do certain actions: thus we say a man has a right to liberty, to reputation, to his property, to defend himself, &c. &c., and in all these cases, whether the word right means law, or a quality of our actions, or a quality of persons, it still imports that something is secured to us or our actions, by reason of an agreement or harmony subsisting between us or our actions, and something which is superior to both, and which is competent to ordain the necessity of such agreement. In the following sentence you have an example of the word right, when used in the three modes we have just mentioned. '*Natural right (LAW) imputes no want of right (RECTITUDE or RIGHTNESS) to actions, in doing which a man only exercises his proper rights; which might again be paraphrased thus: The fitness of things does not permit us to impute a want of rectitude to him, who only exercises the privileges allowed him by nature or law.*

4. The word right is also frequently used adjectively; thus we say, 'it is right for him to vindicate himself;' meaning that it is just, that it is conformable to reason, or to some law. So, also, we say, 'he is in the right', or 'he is right.' By the first of these we mean that his opinion or conduct conforms to truth, justice, law, &c.; by the second, that in what he has done, said or thought, he is conformable to truth &c. We presume that the foregoing modes of using the word right will embrace every case of any interest, at least to the student of law.

Right is expressed in French by the word *droit*, and signifies *straight* or direct. It is said to be derived from the Latin *dirigo*, which implies to conduct a person to some

certain end, by the shortest possible road. Hence, also, the word Rule, which signifies a straight line drawn from one point to another: so that the words right, rule, law, *droit*, are synonymous. In Latin, as we have said, it is expressed by the word *jus*, which signifies also a law. So in our language, as in the French, we say 'a right line,' meaning a straight line, for it is a law of that line to be the shortest and most direct line which can be drawn from any given point to another. The word Right is also supposed to be derived from the past participle, *rectum*, from *regere*, and imports an *order*; so that when a man demands his right, he only asks that which it is ordered he shall have. Thus, says the learned author of the Diversions of Purley, 'a right conduct—right reckoning—right line—right road—a right action—to do right—to have right on one's side—to be in the right, &c. mean nothing more than that those things have been *ordered*, or *laid down*.*

In this acceptation, all rights consist of powers vested in us by some order flowing from a source competent to grant it, which may be either divine or human.

Whether the word Right is used adjectively or adverbially, it results in the same thing. Thus when we say a *right road*, we mean that which is ordered or directed by reason to be pursued by us, if we would attain the object we have in view; and so of a right line, right reckoning, &c. So if we say *it is rightly done*, we mean that it was done according to the order given, whether it be dictated by reason, by law, &c.

Right, then, is defined by Puffendorf to be 'that moral quality by which we *justly* obtain the government of persons, or the possession of things; or by force whereof we may claim somewhat as due to us.' The claim must be wholly just, or straight; it must conform to some order,

*Diver. of Pur. vol. i. 7.

rule or law; for if there be any deflexion from the *right line* of the law, it is not a right, but an unjust pretension. This is substantially the same definition as that given by Grotius; but Rutherforth finds fault with it, and says that instead of describing the quality itself, he has only described the effect of it. ‘Grotius,’ says Rutherforth, ‘only tells us that it makes a man’s actions or possessions just, but the inquiry still is, what makes these things just?’ We reply, their *consistency with law*. We would, therefore, define Right to be the power of doing an action, or possessing a thing, consistently with the natural or civil law, or both. Natural rights, consequently, are the powers of doing, and of having, consistently with the law of nature; as civil rights are the powers of doing and having consistently with the civil law, and the ends of the civil union. From these definitions it appears that rights are *moral*, not *physical* powers; or, in other words, we must distinguish Right from mere power. A simple power is the faculty of acting up to the measure of our strength or liberty; but Right is something more; it is, in fact, this simple, natural power, guided by a moral rule, which leads it *directly* to a certain end. When, for example, it is viewed in relation to a state of nature, it is indeed a power, but it is confined by the natural law, which is nothing in itself but the rules of general utility adapted to the state of nature, and ascertained by conscience, reason, experience &c. so that we may again describe natural rights to be our natural powers of acting and possessing, directed and limited by the rules or principles of utility; which is clearly very different from mere natural power, that importing nothing more than *physical strength*, or the doing and possessing whatever our powers will enable us to do, without any regard to reason, conscience or law. It is manifest that such a power can never be a right, and cannot be claimed even by the gods, much less by men; and, with reverence be it said, even Deity has his

own laws, and his omnipotence is no way impugned thereby. It is true that power is sometimes ranked among moral qualities; but it is only when it bears a particular sense, which is in reality the same with that of Right, as it has been just explained. Thus, for example, we say *pater-nal power*, and mean paternal right: so, also, we say a power over one's estate, and mean a right over the estate. Puffendorf, remarking on this confusion of terms, says, 'the word right, *ex vî termini*, shows that the faculty was properly got, and properly possessed,'* which distinguishes it from mere power.

As natural rights are all those powers which are left unrestrained, except by the law of nature, and as this law is founded on utility, we may say that natural rights consist in the liberty of doing and possessing every thing not forbidden by rules drawn from general utility. Our individual rights are ascertained, in all states of society, by an appeal to the general utility. In civil communities, that utility is settled by the general thought, and is usually expressed in positive enactments: in a state of nature it may be drawn, indeed, from general thought, but is commanded only by the conscience and reason of each individual.

(2.) Division of Rights are susceptible of several divisions, and they have been divided in the first place, into PERFECT and IMPERFECT. Barbeyrac, in his annotations on Grotius, defines a perfect right to be 'one which we may assert by force, and the violation of which is a wrong properly so called, whence it is easy to judge what an imperfect right is.' Puffendorf, when speaking of power, which he uses in that passage as synonymous with right, says that it is divided into perfect and imperfect; 'the former is that, the exercise of which may be asserted even by force against those who endeavour to op-

* Puff. L. M. and N. book 1, ch. 1, sec. 20.

pose it; the latter is that, the exercise of which if any man is prohibited, he may be said, indeed, to be unkindly dealt with, yet he has no right to defend it by force.'

But on these definitions Rutherforth has observed, that such an explanation would only lead an inquirer to another question, viz. what rights may be thus asserted by force? It is therefore the object of that very acute commentator upon Grotius, to seek some further and better distinction between these two species of right, than that which makes the criterion of difference to consist merely in the one being assertable by force, the other not. The first difference which he suggests between perfect and imperfect rights, is the *fixedness* or *determinateness* of the *things*, to which we have a perfect right, or of the *actions* which we have a like right to perform; and, on the other hand, the *vagueness* or *indeterminateness* of those to which we have only an imperfect right.* If, for example, a man should demand his own property, the right which supports that demand is, or may be, fixed and determinate. But if a poor man seeks relief from those from whom he has even good and strong reason to ask it, the right which supports his request is an imperfect one; for its extent is wholly vague and undefined. The second distinction relied upon by Rutherforth is, that where no *law* restrains a man from carrying his right into actual execution, it is a perfect one; but if the law in any respect restrains him from such execution of it, the right is then imperfect: or, in other words, our rights are perfect when we can assert them without disturbing the rights of other men; and imperfect when the rights of others stand in the way of those claimed by us. Thus, for example, the defence of life is a perfect right against those who have no right to take it away; but benevolence or alms is an imperfect right, because I cannot

* 1 Ruth. Inst. 43.

coerce them, as this would be to infringe on the rights of property in others. A perfect right, in fine, according to Rutherforth, consists partly in its certainty, and partly in the privilege of demanding its exercise, because no law, or rights of others, would be thereby infringed.

If, however, we examine this view of the subject a little closely, we shall perceive that this able commentator has not evinced his usual acuteness, and that, after all, he has failed to establish the distinction at which he aims, as both of his criterions may be resolved into those very distinctions which he deems insufficient when stated by Barbeyrac and Puffendorf. If the perfectness of a right depend, in part, on there being no law to prevent its execution, then certainly we may effectuate our right, as Barbeyrac says, by force; for if there is no law to prevent its execution, there is no stopping point; and if we can execute it at all, we may do it by fair or by forcible means. By deduction, therefore, from Rutherforth's own premises, Barbeyrac and Puffendorf would seem to be right in making the just use of force the criterion of perfect rights; for Rutherforth, thus far, has done nothing more than expand the doctrine that the right to maintain it by force is the test of a perfect right, by his showing the *reason* why force may be applied, viz. the absence of any restraining law.

Again: If we take the second clause of his second criterion, viz. the absence or interference of other men's rights, we cannot perceive that he has been more fortunate. To call a right merely imperfect, when the rights of others stand in the way of it, is, we think, not giving it its real character; it can, we apprehend, be no right at all; and so, on the other hand, the capacity to be carried into execution without interfering with the rights of other men, is a quality essential to all rights, and is by no means more peculiar to perfect, than to imperfect ones. Rejecting, however, with Rutherforth, Barbeyrac's criterion of force, and

rejecting also the former's own view, which makes a perfect right one which is not interfered with by any law, or any right of another, since this differs in no comprehensible degree from that of Barbeyrac; if we then consider Rutherford's other criterion, viz. its fixedness or determinateness, we are not sure that even this will be found metaphysically more correct. We have defined a right to be a power of doing an action, or of having a thing, consistently with law. Now as all rights must be consistent with law, an imperfect right seems somewhat unintelligible, since it must then be something imperfectly consistent with law! But as there are no degrees in consistency; as there is no middle point between consistency and inconsistency; this quality of doing or having must be either consistent or inconsistent with law: if it be the latter, it is not a right of any kind; if it be the former, it is then simply a right, and is not susceptible of degrees of perfectness. So, likewise, that it is uncertain to what I have a right, or, in other words, that the indeterminateness of the *object* of the right, should affect the *quality* of the right, is not logical, as it appears to us. A man, on the other hand, may have a very certain right to very undefined things, as to a claim for damages, or to an estate whose boundaries are wholly undefined. The difficulty in such case would be, not to make the object certain, in order to *originate* or create a perfect right, but to make the object certain, so that he might *enjoy* a perfect right already in existence. From what has been said, we are inclined to think that a less exceptionable term than imperfect right might be adopted, when we speak of a right to any indeterminate thing.

That writers on natural law have experienced some difficulty in assigning rights to their respective classes, under this customary division, is evident from various instances which might be cited. By some the same right has been called perfect, which others call imperfect; and rights as-

sertable by force, have been classed under the latter head, whilst some not assertable, have been called perfect. If any right be perfect, we apprehend it is the right of property; because the boundaries of it are very definable, and it is capable of the most complete identification. Hence, among individuals in a state of nature, the infringement of a spot they have cultivated, and among nations also, (which are considered to be in a state of nature towards each other) the invasion of their territory, have always been justly esteemed among the highest offences, because the right is one of the highest, and is unquestionably perfect. And though another individual or nation might design to make ever so innocent a profit out of either, the permission to do so from the owner of the soil, would be of grace only, according to the received notion of perfect and imperfect rights. Such an innocent use or profit would come under the definition of mere benevolence, to which all agree that we have but an imperfect right. Yet Grotius considers the right of drinking of a river running through such land or territory, as clearly established; and so, also, in regard to a passage by other nations through national dominions, with a peaceable disposition, and a necessary object, he expressly declares that it may be obtained by force, if denied to their previous request.* Yet the right to territorial dominions is perfect, and, on the other hand, the right to such innocent profit or passage would seem to be clearly assignable to the class of imperfect rights. The solution of this difficulty is perhaps to be found by adverting particularly to the nature and origin of national property or dominion. If we suppose that national property originated from occupancy in gross; that all nations are to be considered in reference to each other, as individuals in a state of nature; and that when nations became possessed of

* Grotius, lib. 2. ch. 2, sec. 13.

dominion by this general occupancy, there was at the same time an implied reservation to all nations of this right of passage; then the two rights may both be perfect, and in no way clash with each other. They are to be exercised at different times, or for different purposes; they are rights reserved in the same property *diverso intuitu*; and hence there is no inconsistency in according to a nation all the perfect rights which belong to property; and, at the same time, to all other nations the right of passage, which, in this point of view, is also a perfect right, and is, to this extent, what the civilians call a limitation, prædial service, or easement.

Vattel who speaks, as well as Grotius, concerning the right of passage of a nation, that is, of its troops, through the territories of another, comes in effect to the same conclusion; but his reasoning shows how uncertain is the notion of some as to the distinction between perfect and imperfect rights. He says that an innocent passage is due to all nations; but that the sovereign of the nation of whom it is asked, is to judge whether it be innocent. In all doubtful cases, he says, the judgment of the proprietor is to be referred to, and to be observed, though possibly unjust; but yet, if the passage be unquestionably innocent, the nation which is denied it, may assert its right by force. Here appears to be confusion, or, at least, vague notions throughout; a strange mixture of the qualities ascribed to perfect and imperfect rights. First it is a right; then its exercise is to be referred to the judgment of the nation from whom it is demanded; if the matter be doubtful, the denial must be respected; then, if it be clearly unjust to deny it, the judgment of denial may be disregarded, and the claim be vindicated by force. But it may be here asked, who is to judge of its being doubtful or certain? If the nation of whom the right is asked, be the sole judge in doubtful cases, who is to form the previous judgment,

whether the same be doubtful or not? If this judgment belongs to the nation of whom the right is asked, it is clearly an imperfect right; and if it belongs to the other, it would seem to be perfect. If it be a perfect right, as we may infer it is, from its being demandable in the last resort by force, then there is no necessity for craving the permission of the sovereign; and if we suppose it imperfect, then we cannot, under any circumstances, maintain it by force. This example of the uncertainty arising from the use of these terms, concerns nations; but it is equally applicable to individuals, and has been mentioned only to illustrate the difficulty in which this phraseology often involves writers on natural law, when treating on this division of rights. Perhaps this may be gotten rid of by going on a different principle, and giving new names, less calculated to mislead, to these two classes of rights; and this may be done, though we retain the distinction and qualities which are now made to characterize them. While all rights are equally *rights*, they are not equally important to society; at least not all equally assertable and determinate: thus, for example, the right of property is first to be observed, because it has been found to be most essential to the support of society. The right of a poor man to relief is of secondary consequence, because if the right of property be strictly observed, there will be few occasions for its exercise. We might, therefore, divide rights into primary and secondary. We might call them so with equal propriety, on the other principle, viz: of their being more or less determinate or assertable, since a right is of small moment, and of little practical service to an individual or nation, which cannot be defined nor asserted. We might, therefore, call them also determinate or primary, and indeterminate or secondary rights. In conclusion of this subject; a right is said to be imperfect because its measure or exact extent is undefined, and being undefined, it cannot

be enforced. It is nevertheless a right, because it ought to bind the conscience of him from whom it is due. Such a right is perfectly consistent with natural law, though it is not allowed to be enforced lest more mischief should flow from its exaction by the one, than from its unjust retention by the other. But to denominate it an imperfect right because it is not assertable by force, appears to hold it up as a right imperfectly consistent with law, since a perfect right is one which is perfectly consistent with law, as indeed all rights must be. But if we call such a right secondary or indeterminate, we admit it to be as consistent with law as a perfect right is; but its character is indicated by the terms used, which show its undefined and inferior nature.

The word right imports, *ex vî termini*, a correspondent duty in some one to submit fully, or *sub modo*, to the claim; hence Obligation and Right are correlative terms. Where A has a right to something from B, the latter is under an obligation to render that something to the former: and as Rights have been divided into perfect and imperfect, their correspondent obligations are similarly divided.

Much curious learning, and many subtile distinctions are to be found in the books, on the subject of obligation. To separate the dross from the ore is no easy task; and yet, as the fashion of the day is for students very generally to shun the pages of Grotius, Puffendorf, Wolfius, Heineccius, Cumberland, &c. &c. and even Burlamaqui, Rutherforth, and such more inviting authors, it appears to be essential, in such preliminary lectures as the present, that we should look into the whole of these writers, and present to you a portion of their great and, we may say, estimable labours. Rutherforth, in commenting upon Grotius, when speaking of perfect and imperfect obligations, has adopted the opinion that these several kinds of obligation may be distinguished by the following rule, viz: that obligations arising

out of the *negative* precepts of the law are perfect,—while those which arise out of the *affirmative* precepts, are imperfect.* Thus, for example, if it be declared to us, ‘thou shalt do no murder,’ the obligation is said to be perfect, for the matter of this negative precept is precise and determinate, admitting of no liberty at all: but if the command be, ‘honour the aged’—‘respect the opinions of the learned’—‘venerate the good’ &c. the obligations would be imperfect, because by these affirmative precepts we are left with some discretion of acting, and of measuring out what we may conceive to be the portion of honour, respect and veneration due to these persons. On this rule (plausible as it appears to be) we would remark, that besides what we have said in regard to the use of the terms perfect and imperfect, when we spoke of rights, the deriving these two classes of obligations from negative and affirmative precepts of the law, is perhaps equally faulty, and more sophistical. The rule, we think, is calculated to mislead, for though perfect obligations are often connected with negative laws, yet the obligation, after all, is not affected by the phraseology, but is generally wholly independent of it. Had it, for example, been affirmatively enjoined us, ‘respect life,’ the obligation to do no murder would have been equally perfect, though the mode of expressing the legal precept be different. So, on the other hand, had it been commanded thus, ‘thou shalt not dishonour the aged, disrespect the opinions of the learned, despise the good,’ &c. though the obligation is perfect in this case, as far as all dishonour, irreverence &c. are forbidden, yet, in truth, the measure of respect which is due in these cases cannot be greater, and perhaps not as great as where the precept is affirmative; for such precept appears not only to exclude all dishonour &c. but to require something positive, viz: actual manifestations

* 1 Ruth. 46.

of honour &c. Be all this, however, as it may, we cannot perceive that the obligation is likely to be more efficient in the one case, than in the other. Hence, all that can be said on this rule, has been stated by Dr. Paley, viz: that affirmative precepts of law *commonly* produce imperfect obligations. Once ascertain with precision the nature of an act, and the character of the obligation is easily known, without reference to the language in which the prohibition may be clothed.

We cannot forbear adverting at this time, to another distinction set up by Rutherford, which, as it rests on the premises to which we have partly objected, appears to us to partake, in like degree, of their error. The distinction to which we allude, is this. There are, says he, two maxims of natural law often injudiciously applied, and which require explanation. The first is, 'that no right can be founded on an injury;' and the second, 'that what could not be done lawfully, is valid after it is done.' The learned writer illustrates these by supposing a command, 'thou shalt not steal.' If one does steal, the act is void, and no property is gained thereby in the *res furtiva*, because, says he, the obligation not to steal was perfect, and all power being taken away by the law, the act of taking is wholly inoperative. To take with effect the property of another against his command, would be to injure him, and to clothe the violator of the law with a right; the act therefore must be wholly void. If, on the other hand, the law says, 'obey your parents,' and a son of full age marries against their wishes, still the act is valid, though unlawful, since the law cannot, as in the case first stated, suppose that nothing should result from the act of marrying, as it has not expressly taken away the power of acting. Here the doctrine is, that if an imperfect obligation be violated, yet in effect it is valid, though the act ought not to have been done: and this agrees with the maxim, *Quod non de-*

bet fieri, factum valet. Rutherford, however, qualifies this doctrine by another, and admits that what is done in opposition to imperfect duties, is not *always* valid, but only when the *constantly resulting effect is itself consistent with law*. If the effect of violating the imperfect obligation be itself inconsistent with other obligations, then the act is void: as, for example, if a son, notwithstanding the law, 'obey your parents,' should marry his own mother, here the respect which is due from the wife to her husband, is said to be inconsistent with that respect which is due from the son to a mother; and this constantly resulting inconsistency would render the marriage void, though the obligations on both sides were only imperfect. In stating the marriage of a son with his mother, it is not to be imagined that the learned author meant to admit its validity on other or general grounds, because he has given so trifling a reason for its nullity, as the supposed interference of the respect due from a wife, with that due from a son to his mother. Such a marriage is forbidden, we think, no less by natural law, than by the express declaration of the Divine law; but the example was stated by Rutherford probably from the want of a better; and he argues the invalidity of the marriage solely on the ground we have stated, merely as illustrative of the meaning of the second maxim.

The simple meaning of the first maxim is, that no one shall be permitted to derive advantage from his own wrong, or, in other words, that no moral effect or right shall arise from the breach of a perfect obligation. This rule applies only to perfect obligations, and we have nothing to say against it. The second maxim applies only to what are called imperfect obligations, and, as a general rule, according to Rutherford gives effect and validity to all that is aimed at by their infraction. We believe, however, that if the examples which might be put of positive legal ef-

fects flowing from breaches of our imperfect duties or obligations, were strictly examined, it would be found that the obligation was either not violated at all, or that it was superseded by some superior right or duty, and that not a single case, unaffected by extraneous circumstances, can be put, of any legal *advantage* flowing from the actual infraction of an imperfect obligation, any more than from the violation of a perfect one. In the very example put by Rutherford, of a son marrying against the will of his parents, and thus violating the imperfect obligation flowing from the command, 'obey your parents;' if the marriage be valid, I say, in this case, it is because the obligation of obedience did not in any respect extend to the requirement of the parents' consent to a marriage; for if it did, the obligation would be perfect, and the marriage void; if it did not, then the maxim has no application to it, and is without meaning.

We have dwelt perhaps too long on the subject of perfect and imperfect rights and obligations, and now proceed to the next division of rights, viz: into NATURAL and ADVENTITIOUS. Those are denominated natural rights which belong to men by the gift of nature, and which exist in that state in which man was before the introduction of civil society. Adventitious rights arise from civil and political associations, or from any state of society in which pacts or agreements would be made. Hence, all rights which require the intervention of some act of man, as sovereignty, or jurisdiction of all kinds, and property (strictly so called) of all kinds, moveable and immoveable, come under the head of adventitious rights. Our right to freedom, inviolability of person, reputation, health &c. are natural rights. This division of rights corresponds essentially with that of Aristotle, in his Nicomachean Ethics, viz. into Original and Voluntary. It is also the same with that of Maimonides, and other Hebrew writers, who distinguish between

מצות Metzooth, or Precepts, and **חקים** Hekim, or Statutes, the former being the sources of natural rights, the latter of voluntary or instituted rights.* This division also corresponds, essentially, with that of Sir Wm. Blackstone into Absolute and Relative rights. Absolute rights are such as appertain to any individual, merely as a single person; they are such as would belong to the *person* merely of all individuals in a state of nature, and which all men are entitled to enjoy, whether in or out of society. Relative rights are incident to men as members of society, standing in various relations to each other.

It is here proper to remark, that the laws of nature are by no means extinguished by the formation of societies, and the enactment of positive laws; but, on the contrary, the very basis of government and laws is laid in our natural rights; and the natural law itself also sustains the principle, that as positive laws are the dictates of the publick sense, they are therefore obligatory *in foro conscientiæ*. Hence, not only are our natural rights protected by the natural law, but our adventitious ones also, if they be acquired consistently with that law. To violate adventitious rights is, therefore, to sin against both the positive and the natural law. It is consequently a great mistake in those who think that civil laws create no natural or moral obligation; and that the civil sanction is the only one which secures obedience to civil laws. All our adventitious rights, if acquired consistently with the law of nature, are as much our own, and are as inviolable, as if they had been directly and originally given by the natural law.

The third great division of rights is into **ALIENABLE** and **UNALIENABLE**. Those rights which may be parted with consistently with law, are alienable, whilst those which the law forbids us to part with, are unalienable. This

* Maimo: Lib. 3. Cap. 26.

is the usual description, and indeed no other could be given, of these rights. This is sufficiently intelligible when we speak of rights acquired in a civil state, and when the laws are positive: but what rights shall be said to be unalienable in a state of nature, it would be no easy matter to determine. The right of property is alienable, but the right of a prince over his people is unalienable; these two instances illustrate Dr. Paley's distinction, which is, that all rights are unalienable where they originate in a contract which, by the express, or necessarily implied terms thereof, limit them to the person, whilst all others are alienable. But while the distinction between alienable and unalienable rights is sufficiently apparent when we speak of them in civil society, and under positive laws or contracts, we must adopt, we think, a different principle of distinction when we are talking of a state of nature, and of the rights incident thereto. We would class among unalienable rights such only whose retention and exercise are clearly essential to the well ordering of our life in such a state. In that state, as well as any other, the right of property is alienable; and so is the right of mere physical liberty, (if we be allowed the term:) but the right to *moral* liberty is unalienable, because its alienation would incapacitate us to direct and control our duties to ourselves. It is a common remark that *political* liberty is unalienable; and in a country jealous of its liberty, it is a salutary precept; yet, on principle, there is no reason why it may not be alienated, as far as it does not restrict our power of self control, and the regulation of our conduct by the principles of morals. It is so dear and valuable a right, that its alienation could only be justified by the most pressing necessity, especially as it would be so apt to involve consequentially the loss of our civil and moral liberties. As to our natural rights, some are, as we have stated, alienable, others not, according as the rights are, or are not essential to our well

being. Our adventitious rights are all alienable, with the qualification mentioned by Paley, which he applies, and we think justly, as an invariable criterion. Liberty, as a general rule, is to be classed among our alienable rights; for a man may sell himself even unto the most abject slavery. But this is a subject we shall have occasion to advert to again, before we close the present lecture.

(3.) In what the Rights of Nature consist. Having sufficiently explained the nature and division of rights, we now proceed to consider in what the Rights of Nature consist; and on this topick we shall be as concise as may be consistent with the correct understanding of our subject. All rights respect either our persons or our property. Our natural or absolute rights, and our adventitious or relative rights, embrace all rights which can possibly arise either in a state of nature, or of the most complex society. The primary object of society and law is to protect our absolute rights, these being the gift of nature, and essential to our well-being; the secondary object of law is to guard us in our relative or adventitious rights, these being posterior to, and merely consequent upon the formation of society and laws. The list of our absolute rights is, indeed, a very small one, when compared with that of our relative ones; but the former are greatly the most important, for without their secured possession, those which are merely adventitious would be of no value whatever, as it would be impossible to enjoy them. Let us now advert to the nature of these natural or absolute rights, which it is no less the province of the civil, than of the natural law to protect.

The *first* great right of nature is that of life, and the integrity of our body; of life, because it is necessary to the enjoyment of every other right, and to the discharge of all our obligations; and of the integrity of our body, because injuries to our body involve danger to life; and even

when they do not, they injure our happiness, and incapacitate us, in some degree, for the discharge of our various functions and duties. This right appertains in an equal degree to every human being, to the least considerable, as well as the most important individual; and though the life of one person is often of more value to families and societies than that of another, this does not affect the strength or perfection of their respective rights to life, and integrity of body; for this, among other reasons, that there is no common tribunal to determine their relative importance, and every individual, also, deems his own of paramount value. This principle is illustrated in the case of the plank at sea; for only superior strength would settle so melancholy a controversy, where the necessity is equally extreme on both sides; and though the conqueror would be right in thus saving himself at the expense of another, that other would have been equally right, had force given the same advantage to him, though his life to society or his family would have been of little, or absolutely of no value. Here then is a case of seemingly hostile, and yet co-existent rights. Perhaps there may be no great utility in determining the abstract question, whether a man, knowing his own life to be of less importance than another's, would yet be justified in snatching from him the *tabulam in naufragio*, since instinctive terror would seldom, if ever, in such extremity, leave the reason to operate, and since the common sentiment of mankind would excuse, though it could not applaud the act. There are some cases, too, in which the exercise of this right would do violence to emotions so natural and strong in bosoms of sensibility, that the cold predetermination to exercise it, seems, in the eye of some, to betoken barbarity, or at least great selfishness of temper.

That in the crisis of danger our instinctive tenaciousness of life should overmaster these emotions, is, say these ob-

jectors, if not very magnanimous, at least excusable; but they seem to doubt whether one who could deliberately predetermine, on the supposition of such an extremity, to sacrifice to the preservation of his own life, however worthless, youth the most helpless, loveliness the most captivating, wisdom the most profound and authoritative, would not justly deserve execration. I shall not undertake to settle this question for the generous and magnanimous, our business being, not to graduate emotions, but to adjust rights. The exercise of the right of which we are speaking, differs from that of some others which are in reality, and in effect, equally harsh, chiefly in the immediate appeal to our sympathies which takes place in the extreme cases supposed. There is a similar lack of generosity, nevertheless, in many other cases where the sympathies do not happen to be so immediately called on. Philosophers starve, childhood perishes from exposure, loveliness deviates into crime, while many a dastard, who is conscious that he lives to neither profit nor pleasure, feels no obligation, nor does society ascribe it to him, to dissipate for their relief his abundant store. Such a man may not claim the praise of generosity; but the right of property is not the less clear on that account. Curtius and the Horatii were justly lauded for their magnanimity in devoting themselves for the good of their country; yet the mass are not execrable for acting on the more humble principle, that the country is well taken care of, where every man takes care of himself, and who therefore content themselves with performing the military service enforced by law. Perhaps, therefore, the disesteem we should feel for one who avowed such a predetermination, is rather for the obduracy than the injustice he betrays. We feel the same kind of emotion against a surgeon who talks coldly of an operation, though we certainly could not blame him should he avow his de-

termination to go through it firmly, and ought even to commend that firmness as a useful quality.

But it is not every degree of necessity, though very strong and pressing, in which this principle of the *tabula in naufragio* is applicable; for there were no end of violence and slaughter, if a man, under the pressure of even a severe calamity, might for his own advantage, sacrifice any life which he deemed of inferior importance to his own. I have a right to wrench, if I can, the last biscuit from my companion on the wreck; but I would not be justified in killing half the crew of my vessel, in order to save the other half from a short allowance which might engender disease, or prove highly injurious to a delicate person. I have a right to seize the food of the traveller in the same desert with myself, if I know that otherwise I must infallibly starve before I can obtain relief; but it were certainly no justification for this, that the next post house was so distant that I was likely to grow ill from the want of food. It is not easy to measure every melancholy case of this sort by the principle assumed; but this is the case with many other rights, especially those of the imperfect sort. The right we have considered, being beyond the control of positive laws, is, like our natural rights before the institution of society, uncertain in its limits, and in its application.* The right to life, therefore, we conclude to be the

* A shocking instance of the exercise of this extreme right, occurred in England not long since. A carpenter, with his son, was engaged in repairing a steeple in a country town. They were at a lofty point of the spire, the father a few feet below the son, when the latter was observed by his agonized parent to be seized with a vertigo. If he fell in a straight line, he would certainly take his father along with him, and both would perish. The father's life was necessary to the support of the boy's mother, and many brothers. The wretched father's resolution was taken, and, disengaging the ladder, and giving it a tilt in a direction from himself, he precipitated his child to the earth. I am not aware that he was ever tried for this act of dreadful necessity.

most certain, general and valuable of all our natural rights, and to stand first among our perfect rights, (adopting the received division,) since it may be vindicated by force, without measure, and to the point of sacrificing the lives of any number of assailants.

Our right to life commences before we are born, and is protected, both by the natural and civil law, as soon as the fœtus can move *in ventre sa mere*. By the law of England in the time of Bracton, abortion procured by design, or any violence done to a woman so as to produce miscarriage, was adjudged to be manslaughter. But this law was changed, and it was deemed merely a heinous misdemeanor, until the late statute 43 Geo. 3, ch. 58, rendered it a capital offence. But if the child be born alive, and then die in consequence of previous violence done to the mother, it was always considered manslaughter, and by the natural law would, under circumstances, incur the guilt of murder.

The *second* great natural right which claims our attention, is to the fruits of our bodily and mental labour. It is certainly just that what a man obtains by the exertions of his mind, or of his hands, or both combined, should be his own; and this appears clear enough where the property is the product of mental labour alone. But as to corporal things, whereon man's ingenuity and labour have been bestowed, although the justice of appropriation is equal, there has been some refined reasoning, into which, however, it is not my intention to enter minutely.

Property, as it is modified and guarded in civilized states, is undoubtedly the creature of positive law; yet such, under all circumstances of mankind, is the necessity of some degree of appropriation of the soil and its products, that we can hardly imagine the rudest state of nature without some notion of exclusive property. Even when all the fruits of the earth made but a common stock, there

must, for convenience' sake, have been some act acknowledged as the sign of appropriation, and the beginning of ownership, or there had been no end to conflicts; and the fruit which I had plucked from the tree, had been snatched from my lips ere I had tasted it. Where all things belong equally to all, there is no act of an individual which possesses the intrinsick property (so to speak) of making it his own; yet such is the necessity of some common consent in this matter, that it required men, as we have said, to have made only the first step in association, to discover the expedience, nay necessity, of such common and implied compact; for implied it most probably would be, and undoubtedly is at this day, whenever one tribe, however rude, approaches the possession of another.

We have said that there is no act of an individual which can, independently of such consent, bestow on him the ownership of any portion of the earth, or of its fruits; so that the right of property, like all other rights, draws its existence from consent, or acknowledged utility or necessity. It is true that Mr. Locke has assigned to property a different origin; for, in his opinion, things originally common, became the property of the first occupant, not by that tacit consent or agreement by which, according to the doctrine of Grotius and others on this subject, occupancy was recognized as the mark of ownership, but solely in virtue of the occupant's *mixing with them the labour of his body, which is his own*, and thus makes the things themselves his own. Thus, for example, according to Locke's theory, if any one removed fruit from a tree to his own cave or hut, or fashioned the bough of the same tree into a spear; in both these acts there was a labour of his own mixed with the thing taken, and by this mixture, or removing of them out of the state of nature, the things became the property of such person; for if any other person should take the fruit thus removed, or the bough thus fash-

ioned, he took, at the same time, the labour bestowed on them, which never was common property, and to which he therefore could have no right. Thus, while Grotius considers occupancy as the signal of appropriation, agreed on by the common consent of mankind, Locke ascribes to occupancy the intrinsick quality of producing property itself, independently of all consent, inasmuch as the very act of occupancy takes the things out of their natural state, and blends with them that which never was in common; an opinion which does not seem to be justified by his reasoning, or by the nature of the act. We think it will be allowed, that if I take the raw material from another man, as, if I take wood from my neighbour, and expend on it the greatest skill and labour imaginable, my original wrongful taking will not be justified on that account; or, in other words, it is nothing to my neighbour how industriously soever I have exerted myself on the materials of which I despoiled him, for they are not the less his own. Nor is the case at all altered by the circumstance of the material taken in a state of nature, having been common to all when the occupant chose to bestow his labour on it; for what is the meaning of its being common to all, but that instead of one person having property, twenty, a hundred, a thousand, or any number have a joint property, in which case the many would have the same kind of right which, when there is only one, we have supposed in that one. Here, therefore, is no other difference than that instead of taking from one, I take from twenty, a thousand, or more; and how this alters the case, cannot well be made to appear. As long as I take what I need for the present, I take by the right which is common to all, but which, however, is not the right of *property*: but the moment I take more than serves my present want, I exercise an act of property or ownership contrary in the first instance to the common right, and not justified by any subsequent

labour bestowed, or skill exerted on it. We cannot, therefore, but adhere to the opinion of Grotius, adopted by most writers, and consider occupancy as the commencement of property, and this, not in virtue of any inherent quality in occupancy, but solely by reason of the common consent of mankind, involved in the received notion of occupancy, which is the most easy, obvious and certain external act by which an intention to appropriate can be declared. The opinion of Locke, however, has been unqualifiedly adopted by Sir Wm. Blackstone, who advances it as a received doctrine. This is certainly not the case, and the learned commentator has manifestly confounded the common right of using, with occupancy; or, rather, he has not, we think, sufficiently adverted to the nature of the act of occupancy, and the consequences which would result from the doctrine, that occupancy, and the bestowing of bodily labour, should *per se* create property, independently of all consent.

The common consent to which we refer occupancy, may well be presumed to have existed in the rudest condition of mankind, since, though a community of *lands* be now and then found among savage tribes at this day, the notion of property in *moveables* is universal. And well indeed it may be, as it is impossible to imagine any state of mankind in which a consent of this nature is not essential even for continuing the rudest companionship; and as society became extended and refined, the necessity of property became every day more apparent. The same may be said of the fruits of intellectual toil, in regard to which the notions of Mr. Locke may have some degree of justness. Literary property, or the right of an author to the fruits of his mental exertions, has been regarded as an important natural right, and, as such, has often been the object of special legislation, and of grave

and learned judicial discussion.* It would be out of place, at this time, to state the enlightened arguments that have taken place in England on this point; but it is manifest, from the cases to which we have referred, that the able judges who decided them, were familiar with the doctrines of natural jurisprudence, and sought most of their lights from the great code of natural law. We only allude to this fact now, in order to assure the student that the principles of this primeval law can never become obsolete, and that he will have more frequent occasion to refer to them in the discussions of the forum and the senate, than he may perhaps at this time imagine. Municipal or positive law has, no doubt, done much towards defining, and expressly guarding our natural rights; but it is quite certain that there is still much room for argument and illustration from the principles of that copious fountain, the law natural, which can never become a code of *written* reason; and that he who has studied with care the pages of the great luminaries of the natural law, will find how much more valuable becomes the knowledge gained by him from the volumes of a Coke, a Gilbert, a Blackstone, a Fearn, or a Preston.

A third right of nature, to which we now advert, is reputation. On this subject it is sufficient to observe, that the preservation of a good name is not less essential to the purposes of life, than it is agreeable to the conscience which nature hath implanted within us. To observe our promises, to regard an oath, to respect the property of our neighbour, are circumstances essential to our conversation with others, because without them we cannot acquire the

* Vide *Miller v. Taylor*, 4 Burrow's Reports, 2303. *Donaldson v. Becket*, 7 Brown's Parliamentary Cases, 88. *Macklin v. Richardson*, Ambler's Reports, 694. *Clementi v. Walker*, 2 Barnwall and Cresswell's Reports, 861. *Gyles v. Wilcox*, 2 Atkinson's Reports, 141. *Wilkins v. Aikin*, 17 Vesey's Reports, 422.

confidence and esteem which would induce others to cultivate an intercourse with us; and therefore a reputation for these, and other virtuous qualities, is essential to us in the business of men. A fair name is also highly prized by us from that inborn desire which we all possess alike, however our modes of obtaining it may differ, of gaining the love or admiration of our fellows; and whether the desire of that love and admiration springs from the innate perception of the intrinsick beauty of virtue, or from our sense of their operation on our interests, they are not the less sought and loved, and ranked among our dearest and least alienable possessions. In the simple intercourse which man has with man in a state of nature, an honest and unspotted reputation is still highly valuable: it is, indeed, the only means he has to extend and strengthen the partial communion he may have with the species. In society, reputation is protected as a natural right of inestimable value, and the penalties against slander and libel have been, by the laws of most countries, extremely severe. But as this subject more properly belongs to a distinct part of our course, and as we shall be obliged to advert to it again, in the sixth lecture, we decline at this time any inquiry into the enactments of positive law against the infraction of this valuable natural right.

A fourth natural right is that of freedom from restraint, or personal liberty. The rights of personal security, of private property, of reputation, and of personal liberty, have been always regarded as the cardinal or most valuable of our natural rights; and are indeed the divisions to which, perhaps, every species of natural right must be referred.

The right of liberty, simple as its nature may at first appear, has been a topick of much discussion, and of very contradictory opinion. The word liberty, considered generally, may perhaps be defined as *the power which a man*

has to act as he thinks fit, where no valid law or obligation restrains him. Natural liberty, therefore, is the power of acting as we please, except where we are restrained by the law of nature. Liberty, consequently, is not the power of doing whatever we please, although the word is sometimes used in that sense, for we hear in familiar speech of such phrases as these; 'you are at liberty to kill him, but if you do, you'll suffer for it;' 'you are at liberty to take it, but you'll be punished for theft.' Now, according to the definition just given, a man would in neither of these cases be at liberty to act in the way mentioned; for he would be forbidden by the law of nature, and perhaps by positive law also; and in truth, in using such a form of speech, we should only be substituting the word liberty for physical power, which is a very different thing from liberty, or natural right. A man may indeed, on a principle of calculation, be willing to do the act, and submit to the sanction or penalty of the law; but still he cannot be said to be at liberty to do the act; he has the physical, but not the moral ability to do it; and the word liberty, when properly used, is always applied to man wholly in reference to him as a moral agent, though, as we have already stated, it is sometimes incorrectly used without this limitation. Hence we find a distinction in the books between natural and savage liberty, which last, in truth, is not liberty at all. Savage liberty is that which limits its enterprises only by the strength of the individual, or what of the united physical power of others he may be able to wield by his influence, without regard to rights of any kind. Such a liberty is unhappily often used by bad men in all stages of society, but has never been acknowledged, except by Mr. Hobbes and his disciples, to belong, of right, to any individual or nation, in any stage, however rude, of human existence. Natural liberty, on the other hand, is subject to the laws, or, more properly speaking, the obligations of the state of

nature, which are those pertaining to humanity at large; and, as was laconically remarked by Montesquieu in relation to civil liberty, 'if a man could do what these laws forbid, he could no longer be possessed of liberty, since all his fellow men would have the same power;'^{*} in other words, that could with no justice be called liberty, which, while it exercised an uncontrolled independence as to others, was proportionably exposed to some fortuitous tyranny from other quarters. As the liberty of physical motion must be regulated by the laws which nature hath impressed upon matter, so moral liberty ought to be regulated by the ties of mutual obligation. Since in a state of nature there exist no positive laws; since there are no lawgivers to be respected, no magistrates to be obeyed, our liberty in this state is under no other restriction than such as springs from our intrinsick nature, and essential constitution; and these restrictions are ascertained by the lights of reason and conscience.

Liberty has different acceptations, according as it is varied by circumstances, or the relations in which persons may stand. Hence liberty has been said to be of the seven following kinds: 1. Savage liberty, or the *libertas faciendi quidlibet*. 2. Natural or moral liberty. 3. Social liberty, 4. Simple freedom from confinement. 5. Relative liberty, or *Facultas ejus quod cuique facere libet, nisi quid vi aut jure prohibetur*. 6. Civil liberty: and 7. Political liberty. Perhaps this classification is too minute, for some of the kinds are scarcely distinguishable from each other. Savage liberty is probably not entitled to be regarded as liberty at all, for the reasons just given, and for others which will be mentioned hereafter. Social liberty is distinguished from civil liberty, by a very nice, and almost imperceptible line. The fourth kind, viz. Simple freedom

^{*} Mont. Spir. of Laws, book 2, ch. 3.

from confinement, is rather an actual condition, than a faculty, or right; and as a right, it is included in several of the other kinds. The seventh, viz. Relative liberty, seems to convey no definite meaning, as distinguishable from natural and civil liberty. For a detailed explanation of these several kinds of liberty, we refer the student to the authorities below.* In the sixth lecture, however, we shall have occasion to explain with care most of the foregoing divisions of liberty.

(4.) Liberty is sub- We shall conclude the present lecture
 ject by natural law with briefly pointing out to you the limi-
 to three species of tations to which liberty is subjected by
 restriction. the principles of the natural law. The restriction to which
 we allude is three-fold, arising, first, from our duty towards
 God; secondly, from our duty towards mankind; and
 thirdly, from our duty to ourselves. These we shall con-
 sider in an inverted order, beginning with our duty to-
 wards ourselves.

1st. It is evident from the structure of our bodies, and from the temper of our minds, that both are adapted to afford us great enjoyment and pleasure, including under the word pleasure all the utilities of life; which extended idea is strictly philosophical under other systems besides that of Epicurus. But neither of them will arrive at these desirable ends without a proper order and economy of them; so that health of body, and soundness of mind, (the *mens sana in corpore sano*;) are the foundation of all our pleasures, and all the utilities of life. It follows hence, that it is a high duty in us to preserve our health, and to cultivate our intellect, so that the body may be guarded against injury and premature decay, and the mind be preserved

* 1 Burlamaqui's N. Law, chap. 3, sec. 15. 1 Tucker's Blackstone, 124, 125. 145. 2 Rutherford's Institutes, 374. 388. 1 Evans' Pothier on Obligations, 51. Montesquieu's Spirit of Laws, Book xi. ch. 15.

from the weeds of ignorance and vice, during the usual term of life allotted by Providence to man. To this class of duties belong temperance, self-government, industry, and the pursuit of knowledge, qualities which are hardly less grateful in their influence on our fellows, than they are useful to ourselves.

2. Our natural liberty is limited, in the next place, by our duty towards mankind. If we desire to live peaceably with others, to derive our proper enjoyment from the goods of nature, and make the best use of our faculties, we must show to others that justice and benevolence which will conciliate their confidence and affections, and engage them to a similar demeanour to ourselves. This restriction of our liberty, while it is thus essential to the purposes of life, is happily heightened by that desire of mutual esteem which, as we have elsewhere remarked, causes the sacrifice of many selfish gratifications. And if all these fail in producing a proper temper and conduct towards our species, there is another principle which is yet loftier and more solemn than all the rest, and which has been appealed to in all ages, as the foundation and principal bulwark of human society, laws and obligations: we allude to,

3. Our duty towards God. If there were no other reason for restricting our natural liberty by obedience to the will of God, than his unlimited power over our destinies, it were of itself sufficient. But we discover that this Being adds infinite benevolence to unlimited power, and that all his laws are promotive of our felicity: and moreover, as his benevolence embraces all mankind no less than ourselves, we cannot violate the laws of justice or benevolence towards any of our species, without at the same time opposing his designs. Our duty therefore, both towards others and ourselves, is a part of our duty towards God. But our more particular duty towards him, is to entertain just notions of, and affections towards him; firmly to be-

lieve his existence, wisdom, power and goodness; and to show these by our deportment in regard to him, as well as by the discharge of our duties towards our fellows.

All these restrictions on our natural liberty obtain in every modification of our existence.

Our natural liberty being thus limited in the three ways we have stated, it has been made a question whether we can voluntarily lay it under a general restriction; that is, whether liberty be an alienable right. This topick has been alluded to in the present lecture, with a promise to recur to it. To determine this question in the manner that Rutherford has done, by merely saying that liberty is alienable 'because all our rights are alienable as far as it is not contrary to any law for us to part with them,' is, perhaps, to determine right, but would not distinguish between the different and distinct ideas which are comprehended in the same phraseology. That I have a right to restrain my liberty, that is, to part with it to a certain extent, is obvious enough from my daily obliging myself by contracts and promises, which I am not only at liberty, but bound in duty to perform. Unquestionably, too, I am under an obligation to restrain my liberty according to the behests of the laws; nor can it be questioned that a man may sell his labour to another, even for life; nay, further, he may bind himself by all the obligations of slavery. So, likewise, a man may subject himself to imprisonment for life, under the influence of some extraordinary motive, such as to save the life of a worthy man, or the life of a parent necessary to his children. The doubt as to the alienable nature of liberty, has, we conceive, arisen from two causes; first, from not properly ascertaining the nature and extent of the obligations of slavery; and secondly, from not correctly distinguishing between natural liberty, and civil and political liberty. It has been urged, in the first place, that liberty is not alienable, for that no one

can sell himself into slavery, that being a perfect despotism, or an absolute power in the master to control all the actions of the slave, for the sole emolument of the master. If this be the legitimate meaning of slavery, it must be admitted that liberty cannot be thus alienated. But this is assuming the very ground of the controversy; we do not think that this is the nature and extent of slavery. The master's rights, and the slave's obligations, must always be subject to the restraints of the natural law. The power of the master may be called *absolute*, or a *perfect despotism*; but still these terms do not *in se* imply the absence of all limitation, but simply that the power is absolute or perfect, because restricted by no positive compact or agreement between the parties, and possibly by no express law of man. Thus, for example, parental power is said to be absolute, because there may be no positive limitations on it; but there are many implied restrictions, for it is governed by a superior law, viz. that of God, of conscience, of nature. So, also, civil despotism is said to be absolute, as there are no constitutional nor positive limitations on it; but yet it is, from its nature, limited by the laws of God and nature, and by the ends of the civil union. With a like understanding of the word slavery, there can be no doubt that liberty is alienable to every extent that does not import a power in another to direct all our actions, without any reference to the laws of nature or of God. To this extent no man can go, because no one possesses such savage and unlimited liberty, and, consequently, cannot alienate to another what he does not himself possess. Could this be done, all the obligations of man might be cancelled, and that might be effected *per obliquum*, which could not lawfully be done *per directum*. Understanding slavery, then, in the sense we have defined it, we can see no reason for supposing that the law of nature forbids the alienation of liberty, even to the extent of

placing the person who parts with it, in a state of slavery.

The second cause of error on this head consists, as we have stated, in not properly distinguishing between natural liberty, and civil and political liberty. Men in society, feeling the advantages of certain laws, and a defined constitution, have endeavoured to establish it as a maxim, that though natural liberty may be alienable, yet civil and political liberty are not. And many persons, not advertent to the various kinds of liberty, have erroneously contended that liberty generally is unalienable. The alienation of natural liberty, when it places the person in a state of slavery, has been supposed by many writers to involve necessarily the posterity of such person in the same condition. We shall have occasion hereafter to comment on this doctrine, which we conceive to be founded on a tissue of sophistical reasoning. So also, as it is said that the alienation of civil and political liberty seems necessarily to implicate the rights of the posterity of those who make it, it has been contended that the first of these cannot be alienated, as society is constituted, without involving the slavery of our offspring; and that the second cannot be renounced by its possessors, without endangering the safety of the other. In regard to the individual himself, we entertain no doubt as to his right, under the *lex naturæ*, to alienate either his civil, or his political liberty. There is nothing immoral, wrong, or inconsistent with natural law, in an individual's expatriating himself, or becoming a mere cosmopolite, that is, a citizen or subject of no country. He may contract to relinquish his own civil and political rights entirely; but how far these may be alienated so as to involve our posterity, will be a topic for future inquiry. When, however, we consider that these rights are essential to our safety, to a proper tone of mind, to intellectual and moral improvement, it cannot be doubted that he who yields them up, on

any occasion whatever when they can be asserted with any prospect of success, and with less sacrifice than that which may arise from their alienation, commits such a crime against a prudent economy of his rights, as merits the appellation of a great enormity.

We have stated that a man has no right to alienate his liberty, so as to give to another a power to command what is contrary to the rights and obligations of nature. So, also, there are many rights essential in themselves to human nature, and whose exercise we have neither a moral nor physical power to restrain; such, for example, as the right and duty of reverence to God, and the freedom of thought, especially on matters of conscience and religion; the persecution of which is surely the vilest infringement of human liberty that despotism ever attempted, since it was a matter which punishment might reach, but could never amend or prevent, and was therefore no longer punishment, but cruelty and malice. So, too, the right to judge in one's own cause, may be called unalienable, because it is, in truth, involuntary, and in society we in strictness give up the right to *redress*, rather than the right to *decide*. So, also, the cultivation of virtue, or the mind, though its outward acts may be restrained by despotism on the one hand, or publick licentiousness and turbulence on the other, is the duty of all situations alike, and is the irrefragable obligation, as well as the unalienable right of man, in all places, and under all circumstances. The decrees of despots, therefore, which would limit the diffusion of knowledge, and keep the mind enthralled in ignorance, are the most alarming acts of tyrannical power, and should be met at once by the most decided opposition of the people. So, on the other hand, that unworthy jealousy which is sometimes manifested by the people in republicks, against knowledge, and the power and influence which it justly confers, may be equally detrimental, and

should be obviated in the only effectual way, by a judicious use of that power, and by timely and constant exertions to enlighten the general mind. Little, however, of this narrow jealousy is to be seen among the people of this country; and that little is diminishing daily. But whether the mind be shackled, and compressed within unnatural limits, through the fear of despots, or the jealousy of an ignorant multitude, the effect is the same, and the infringement of our natural liberty is equally enormous and unjust. Happy is the country where the people are enlightened as well as free; and free must that country soon become, if the people are enlightened. There are a few remaining rights which are referred to the natural law, and which are yet to be briefly considered; with these we shall close the present lecture.

A fifth right of nature is said to be that of patrimony, or the domestic right of children to property acquired by their parents. This right has been questioned by some judicious writers, by whom it has been contended that we can have no property by the law of nature, beyond the mere demands for sustenance; that nothing can be assumed beyond what is required for our use; and, consequently, that we can have no control over our acquisitions, after our power to use them has ceased by death. It is further argued by them, that even if they be greatly improved by our labour, it is sufficient if they have thereby become more advantageous to ourselves, and that they can found no right in us to transmit them to others after death: hence, say they, such qualified property ends with our life, and then reverts to the common stock, and becomes again subjected to the claim of occupancy. They infer from this course of argument, that children have no better claim to their parents' acquisitions, than others have; and that even in civil society, there needs the sanction of law, not only to clothe them with a superiour claim, but also to transmit such property

in a prescribed and secured course of descent: So that independently of law, a man's estate, even in society, would be a subject of occupancy, and the claim of strangers would be equally valid by such occupancy, with that of the children or other relatives of the deceased. The better opinion, however, on this subject is wholly different, viz. that property beyond the wants of man may be acquired in a state of nature, and in society, independently of law; that such property is not only alienable *inter vivos*, but that children have a natural and superiour claim to the property of their parents over strangers; that it does not revert by the *lex naturæ* to the common stock; and that in society it needs not the aid of law to vest such a right in the children. Both Grotius* and Puffendorf have argued this point fully, in favour of the paramount claim of offspring, and other relatives of a deceased person who has been silent as to his wishes in relation to the disposition of his property after his death, showing that the province of the civil law is merely to regulate the course of descent. We know, also, that in the earliest records of human, no less than of divine history, the right has not only been acknowledged, but, in most nations, parents have been considered almost criminal who have neglected to amass property for their children; and the earliest laws have inhibited their alienating property to the prejudice of those who appear to have such strong claims. This was the law in the forests of Germany no less than at Athens; and Plato lays it down, that the possessions of a parent are held merely in trust for his children; whilst by the Roman law the child could be disinherited only for valid reasons, to be sanctioned by a court of justice.

A sixth natural right is said to be that of making a will.

Those who deny the patrimonial right of children, of course repudiate the idea of a parent having a natural right

* Grotius, *De Jure Bel. et Pac.* 6. 2. c. 7. sec. 5.

to make a will, and refer the testamentary power wholly to the aid of the civil law. Grotius, however, is very clear in considering it a natural right, and holds that civil laws merely prescribe the *formulae* of the instruments by which the testator's will is indicated, and sometimes interfere to prohibit a prejudicial exercise of this natural right. Puffendorf on the other hand, though he admits the natural claim of heirs in case of intestacy, does not agree with Grotius in referring the testamentary power to the natural law; but his reasoning on the subject appears to us very unsatisfactory. The weight of authority may be on the side of Grotius; but his able commentator, Dr. Rutherford, has argued this point with his usual ingenuity, and has decided against the natural right of disposing by will. The course of his reasoning on this subject is substantially as follows. He thinks that independently of the aid of the municipal law, no one can transfer his property, either by will or by intestate succession; for if the devisee be made previously acquainted with the testator's kind intentions, and accept of the bequest, such a transfer would not be strictly by will; and if his acceptance were not during the life of the testator, the transfer would come too late, the testator then ceasing to have any power over the property. Consent to part with property, and acceptance by him to whom it is to be conveyed, are essential to every transfer, unless the laws of society see fit to sustain a transfer on different principles. It is the nature of a will to operate only after death; acceptance can come only at that time, and positive law permits this in aid of the intention of the testator, which would be otherwise defeated. The testator's consent is sufficiently manifested by the will itself; but where the legatee's acceptance comes (as it must) after the death of the testator, there would be an interval of time in which the thing bequeathed would be without any owner, and consequently it would revert to the common stock, to

be again the subject either of division or of occupancy. Every one is supposed to have acquired property by occupancy or by division. His property only extended to the right of enjoyment during life, and of alienation *inter vivos*. So also, by the *jus naturæ*, no one is competent to transmit his estate to his heirs by right of succession *ab intestato*, any more than he can transfer it to any one by express will, because, in either case, as acceptance must come after the death of the owner, the heir or legatee can have no settled or fixed right at the very instant of the owner's decease. If the acceptance or consent take place during the owner's life, it can only be as to a present right, to be enjoyed at a future period; and even in this light it would not come up to the received notion either of succession *ab intestato*, or of taking by will. A will, moreover, is in its nature revocable till death, and can transfer no inchoate right whatever before that event; so that if the laws of society are wholly silent on the subject of succession by right of inheritance, or of taking by will, the heir in the one case, and the legatee in the other, have no more right to the estate than any one else. It rests in the body of the community, and there remains until it is again disposed of either by occupancy or division.

The foregoing view of the subject is concurred in by Sir William Blackstone,* who considers the *jus disponendi*, whether by descent, devise, or otherwise, to be merely a civil right, and that the law of nature suggests that, on the death of any owner, the estate should become common, and be again liable to the right of occupancy. This theory, however, is not sustained, we think, by sound reasoning, and it certainly has not the weight of authority in its favour.

But if the testamentary power be established as a natural right, it is still doubted whether it extends so far as to ena-

* 2 Black. Com. 1.

ble a parent to bequeath his property wholly from his offspring. It would be difficult to come to any very clear decision on this subject, since it depends on such a variety of circumstances. The age of the child, its ability to provide for itself, its conduct to its parents, its character &c. may all vary the decision; but on the whole it may be stated, that a parent has no right by the law of nature to disinherit his children, if they be left helpless, or a burden on society or on friends; but if the child has been disobedient, and be capable of gaining even a rude subsistence, the parent may, consistently with the law of nature, wholly disinherit him.*

We have now finished our notice of all the topicks intended to be embraced in our examination of the Rights of Nature.

In concluding the preceding lecture, we observed that, after treating of the Rights of Nature, we should proceed to inquire into the origin of Society, and the various reasons which promoted and urged its institution; a topick which has been necessarily treated, in part, in the very consideration of the evils of a State of Nature, since those evils are amongst the most powerful causes of civil association. We shall, therefore, show you in the ensuing lecture, the nature of primary society, as distinguished from civil society, and explain the origin of civil government.

* The law of England has strangely departed from the *jus naturæ* in this respect; for it is understood to be the undoubted legal right of parents in that country, to devise their entire estate to strangers, though their offspring should be left a charge upon the publick; and it is said that the executors, who have property in hand, cannot be called on to relieve the community from the burthen. On this subject Lord Alvanley, in the case of *Rawlins v. Goldfrap*, reported in 5 Vesey, 444, thus expresses himself: 'I am surprised that this should be the law of any country, but I am afraid it is the law of England.'

LECTURE IV.

OF THE ORIGIN OF PRIMARY SOCIETY, AND OF CIVIL GOVERNMENT.

(1.) Of Primary Society. WE have stated in the preceding lectures, that the proper and, in a certain sense, the natural state of man, is that of society. In that state his powers are best elicited; his sympathies have their necessary objects and operations, and convert the existence which was before brutish and selfish, into an existence intellectual and generous. But these advantages are not necessarily confined to civil society: perhaps all the chief ends of man might be attained without his ever entering into that peculiar species of association, or departing from that state which, in contradistinction to civil or political union, has been called by natural jurists, simple or primary society; and this certainly would be the case, were man less prone to injustice, and to the use of power without regard to right.

You will better understand this position, when you distinguish with a little accuracy between these two species of society, and consider, in the first place, the definition of a state, and of a citizen, and then the simple nature of that primitive association of man which has been denominated primary society, and which was certainly coeval with his existence.

A state, then, is a combination of individuals for the ends of political government: a citizen is a member of that

state, considered in his capacity of making or obeying laws. It is not in his capacity of parent, husband, master, that we call a man a citizen; these are his private relations; and we distinguish them by that term from his relations as governor or governed, maker, minister or subject of laws; in which last relations only is he properly called a citizen.

But man may well associate, and even establish many important ties of union, without being formed into any civil society. Such Grotius supposes was the state of the early patriarchs, who dwelt in tents, and travelled from place to place, without any political union whatever. So, also, Gronovius is of opinion that the first inhabitants of Italy, and some aboriginal tribes of Africa, were in this state of simple union, or primary society, without laws or government; and the Getulians, Cyrenaicans, and primitive Libyans, are represented by Sallust, Pomponius Mela, and other writers, as connected by no other ties than those of parent and child, husband and wife; and as scattered or wandering about the country, often in numerous families of children, grand-children, and other relations by consanguinity or marriage. This comes precisely up to the notion of primary society.

It is obvious, indeed, that men's motives for this simple association may be very different in themselves, though they look towards the same ends. The love of our moral and natural pleasures would bring men together; and the fear of their injury by some unworthier persons, would in time induce their submission to political union and laws: the first being done in pursuit of a good, the second in avoidance of an evil. Men would be most happy to enjoy these private relations without the interference of laws, (whose partial operation is often exceedingly inconvenient, and sometimes unjust to individuals,) if a greater mischief were not avoided by this smaller sacrifice.

It is probable that our intellect, our affections, and our physical powers could be as effectually and happily exercised without a political association as with it, if men loved and did justice, and had capacity to apprehend the necessity of yielding up individual gratification, in such a degree as is called for by the general good. The father could rear his child, and cherish its mother; the labourer could till his field, and the scholar cultivate his mind, as well without these complicated systems of restraint, as they have done since their invention; and when we consider how much natural liberty is abridged, and that men, however much the sport of accident, or the slaves of custom, have in the main sought to promote their felicity by their institutions, we shall be assured that they have not made such sacrifices without the prospect, or, at least, the hope of adequate compensation. Thus therefore, as we have remarked, when it is said that society is essential to man, we may be said to make two declarations in one, both of which are true undoubtedly, but in a different sense. It is impossible, we think, to conceive of men other than as associated in groups, exercising their talents, and enjoying the play of their sympathies; in other words, it is impossible to think of mankind otherwise than in a state of at least primary society; whereas it is more easy to conceive him apart from his civick habits, practising virtue without law, and doing justice from benevolence. The one situation, in fine, that of primary society, essentially arises from our organization; the other, that of civil society, appears wholly adscititious, or the accident of our circumstances, and the offspring of our vices, rather than of our virtues.

In considering this state of primary society a little further, we shall find that there are three principal relations which subsist in it, and which have been among the chief topicks that have engaged the attention of those who have treated of natural jurisprudence, viz. the relations of hus-

band and wife; of parent and child; and of master and servant: to some consideration of each of which relations of primary society, we now propose to draw your attention.

1. Of the relation of HUSBAND AND WIFE. Since states are composed of individuals, and educe their strength, among other things, from the number of these; and since families, considered with regard to the tie between their members, are also a great support and bond of communities; we shall have occasion to consider marriage, or the relation between husband and wife, in reference to these two important ends; which ends, though they appertain more strictly to civil than primary society, we shall briefly consider at this time, in connexion with this latter association, because they could not be examined under any other of the heads we have proposed, and likewise because they are, in truth, so intimately united with the other topicks of this head, that they could not conveniently be disjoined.

To ensure the duration of a species so noble in its powers of intellect, and in its capacity of happiness, nature has endued the two sexes with a physical inclination for each other. But in order that this inclination shall be controlled within such bounds as will ensure the propagation of the species, she has chastened it with a moral sentiment of love and esteem, very different from the emotion to which we have alluded, and much more durable; and also with a most tender affection for the mutual offspring. This esteem, however, can neither be perpetuated without constancy to each other, nor can the issue be so certain, or so tenderly beloved, unless promiscuous intercourse be restrained. It is on these principles that matrimony has been always regarded as essential to man's happiness; and is the necessary offspring of association, or primitive society, as it is also the first care of civil and religious institutions.

It is not my intention to enter into all the considerations which recommend marriage, or even into those more im-

mediately connected with the topicks of the present lecture. I would remark, however, that this is the most important relation of primary society; and that it must have subsisted before civil associations and positive laws, because it is a relation suggested by our nature, and the very first circumstances under which man is placed after his maturity. Hence Rutherford defines marriage to be 'a contract between a man and a woman, in which, by their mutual consent, each acquires a right in the person of the other, for the purposes of their mutual happiness, and of the production and education of children.'* This, it is evident enough, may as well be made in primary, as in civil society: the motives, the ends, the affections are the same in both; and though positive laws may put restraints of various kinds on the making of the contract, or as to its termination, and enact many rules in regard to the conduct of the parties, it is not the less a relation of mere primary society.

The marriage contract is said to differ from all others in this, that it is necessarily of perpetual obligation, and cannot, like all other contracts, be dissolved by the mutual consent of the parties by whom it was made. This point has been argued by the commentator on Grotius, with his usual ingenuity, though perhaps with occasional sophistry. The objects of marriage, and the obligations it imposes in regard to the offspring, render it indissoluble by the mere act of the parties. Nay, the consent of the offspring, when of full age, added to the sanction of the community, would not justify the parties in dissolving the contract. Divorces, therefore, are against the law of nature. They were indeed permitted by the Mosaic law; but the God of Nature ordained this through the Jewish legislator, for special reasons; and as the laws of nature are of his insti-

* 1 Ruth. 314.

tution, he alone was competent to allow the dissolution of a contract, otherwise perpetual in its obligation. This view of the subject appears to be confirmed by Christ, who, when he repealed the Mosaic law on this subject, expressly says, that though Moses (as the minister of God) allowed the Israelites to put away their wives, yet 'from the beginning it was not so.'*

But notwithstanding the perpetuity of this contract be such, that although it originates in the consent of the parties, it cannot be dissolved by their consent, yet there are circumstances recognized by the *jus naturæ* to be of such a character as to justify its dissolution; so that though the maxim, applicable to all other contracts, that *unumquodque dissolvitur eo modo quo colligatur*, does not apply to the contract of marriage, yet it may be terminated short of the death of one of the parties, by the circumstances to which we have alluded. Thus, if one of the parties deprive the other of any essential and permanent right appertaining to the contract, that other, being the injured party, may insist on its dissolution. The party doing the injury, cannot dissolve it, for this would be acquiring a right from his own injury, or breach of a perfect obligation, which is contrary to one of the clearest laws of nature; but the injured party may insist on its termination, because it is not in the power of the wrongdoer to place matters *in statu quo*. Hence, for example, the law of nature recognizes adultery as a valid cause for the dissolution of the marriage, when the innocent injured party insists on it. The very definition of marriage shows that adultery has deprived the injured party of a perfect and essential right; but even this *per se* does not dissolve the contract; it only clothes the injured party with the power of dissolving it. It is perhaps on the same principle,

* Matthew, chap. xix. 8, 9.

that the Canonists allow a divorce *à vinculo matrimonii* for previous corporeal imbecility, though, in such cases, it is rather on the ground that no marriage in fact existed, than that one is dissolved. So, also, it is to be remarked that *impotentia seu frigiditas* renders the marriage voidable only, and not void, for such a marriage is valid as to all civil purposes, unless the decree of nullity take place in the lifetime of the parties. It would be out of place, in this institutionary part of our course, to dwell on the subject of divorces; but we may state that the policy of most countries, in modern times, has been to allow of no other ground for the actual dissolution of the contract, than adultery; and even as to this, it has been the opinion of several learned and philosophical writers, that it should be allowed only in the case of the wife's infidelity, and this distinction appears to be countenanced by scripture.* No power in England is competent to grant a divorce *à vinculo* for adultery, but parliament.† In regard to impotency prior to marriage, it is regarded in several of the states of our union, as a valid ground of dissolution:‡ but a contrary doctrine has lately been established in the state of New York.||

From what has been said it is manifest, that neither by the civil nor the natural law, can a marriage be dissolved by consent; and that adultery is perhaps the only supervenient cause for annulling a marriage, under the natural law. Supervenient frigidity has never been held in England sufficient, and could only, if at all, be sufficient by the *lex naturæ*, under very special circumstances. Where the spiritual or other courts grant a divorce *à vinculo* for causes existing prior to the marriage, such as precontract,

* Taylor's Civil Law, 240. Pothier, *Traité du Contrat de Mariage* No. 516. Matthew, cha. xix. 8, 9, 10.

† Blackstone's Comm. 441.

‡ 1 Hay's Connecticut Reports, 112, *Benton v. Benton*.

|| 1 Hopkins' Chancery Reports, 557, *Burtis v. Burtis*.

fraud, mental imbecility, consanguinity and affinity, it is on the principle that no contract ever legally existed, and therefore that none is actually dissolved by the decree of divorce. A valid marriage contract, therefore, appears to be of perpetual obligation, not only by the natural law, except for adultery, but also by the civil law of most countries. When the Roman law, therefore, allowed voluntary divorces, which were also introduced into France by the code Napoleon, and were virtually the law of the Athenians, the *jus naturæ* was no doubt violated. This, however, was the law of Rome from the time of the tables until the full establishment of Catholicism, with the exception of some restraints put upon its abuse by the emperor Augustus, and its temporary abolition by Justinian. That this divorce *sine ullâ querelâ* was productive of much corruption, and of the most serious evils among the Romans, there can be no doubt; and yet we find that in the novel of the emperor Justin, which restored the ancient law of divorce *sine causâ*, it is gravely asserted in substance, that Justinian's regulation had been productive of great evils and crimes, and that the freedom of divorce had become essential!* By the laws of most civil societies, there is also another species of divorce, called *à mensâ et thoro*: this, however, is a mere legal separation of the parties from bed and board, and is justified by the law of nature. It does not dissolve the contract, and is granted only for such supervenient causes as do not essentially affect the marriage contract. The parties thus separated, cannot marry during the life of either; and any issue born to the husband after such legal separation, is legitimate. It is allowed only where one or both of the parties have evinced such dispositions and habits as render it highly improper or dangerous for them to live together.

* Taylor's Civil Law, 353. Digest. 24. §. 34. 157. Novel 140.

The perpetuity of the marriage contract, considered even in the light we have just stated it, has been questioned by some, and Rutherford has been thought to have pressed the doctrine too far. We have sufficiently stated our reasons for thinking otherwise.

The definition given of marriage, and the great ends contemplated by that union, seem to confine its validity and its utility to the alliance of one man with one woman. Polygamy is generally inimical to the interests of individuals and of states, and this is demonstrated in nearly the same manner as the perpetuity of the marriage contract. There are circumstances, however, which render it less deplorable in some cases than in others.

Although polygamy is not, to our apprehension, defensible in any situation of nations, as a general custom, there are some imaginable cases where individuals, apart from the general effect, would be justifiable in having more than one wife at the same time. Utility therefore, in this as in other cases, must be the standard whereby to decide the consistency of polygamy and monogamy with the law of nature; and utility may incontrovertibly demand both. It is unnecessary, and it would lead to too much detail, for us to enter on the arguments generally used in support of this position; for you will discover in all ages, and among all people, the reception of this sentiment. We have considered marriage as a connexion incident to primary society, and not merely the creature of civil government, because we find it to be essential to the existence of the most simple association of man, and enjoined by considerations which are as prevalent before, as after the establishment of civil union. For whether we consider it as enforced by mutual affection; by the love of our offspring, and the necessity of nurturing and educating them; or by considerations of quiet, and the tempering of appetites which often grow fierce by indiscriminate indulgence; marriage is not

less necessary to men living out of the control of government, than to those who are subjected to numerous laws, and all the refined regulations of policed societies. Marriage is required by civil laws, not merely that the law may have defined heirs among whom to distribute estates, or on whom to bestow a throne or titles; nor merely because there are enough men born into the world, allowing for the 'accidents of flood and field,' to afford a spouse for each female; but because it is regarded as a dictate of the law of nature, sanctioned by the civil law in such a degree and manner only as comports with natural law; and hence polygamy is generally regarded as adverse to its injunctions, and has been no less generally proscribed by the civil laws of enlightened nations, than by the natural law. The deeper principles of love, which allows no division of its empire; paternal and maternal affection, whose original charm springs from the sympathetic attachment of parents; temperance of appetite, which love teaches in the first instance, and sober sense approves and confirms; all unite in urging matrimony, and pointing out to men in all ages, places and circumstances, monogamy, or at least single concubinage, as in all respects most suited to promote our happiness, and all the ends of the union of the sexes. Even where polygamy and concubinage are received, the forcible voice of nature selects some one as the more beloved object; and policy distinguishes the legal wife from the purchased slave. We find this the case among the Turks and other Mahometans at this day; and it is true of those nations which, in an earlier age, occupied the same climates, and allowed the same indulgence. Even the Grand Seignior has his Sultana, and Darius had his Statira; and as the law in these countries requires a wife to give an heir to the throne, love sometimes selects from the victims of tyrannical lust, some favourite who engrosses all its attentions.

The limits to which we are necessarily restricted, forbid us to discuss at large the various obligations imposed by the natural law on man to contract marriage, for the purpose of perpetuating his species, of rearing them in the best possible manner, or of consolation and protection to the other sex, whose tender nature requires his utmost care and devotion. Nor can we here enter into the consideration of many questions growing out of our subject, such, particularly, as those which relate to the invalidity of marriages between persons nearly related by consanguinity or affinity; the prohibitions of the law of nature as to these incestuous connexions; their nullity under the levitical, the canon and the common law, and the laws of various nations, ancient and modern; what marriages, (if any) are valid under the *lex naturæ*, though against Divine positive law, and the received doctrines of sound policy and correct morals; whether relationship by affinity and by consanguinity ought not to be distinguished in respect to incestuous alliances; the true cause of the subjection of the wife to the authority of the husband; whether consent *per se* will constitute a valid marriage; in what respects espousals differ from marriage; of the effect of fraud or duress, idiocy or lunacy, or the want of proper age, on this contract; of the effect of marriage where one is of competent age, and the other not; of the operation of a mere promise *per verba de futuro*, by one of mature age, to one who is not; of marriages formed in error without fraud; and very many other questions, most of which appertain to a different part of our course, and will occur to you in the pursuit of your general and professional studies. You will find, however, from sacred history, the source of much excellent knowledge, that marriage is coeval with the race, was commanded by the Creator, and was respected as the most solemn of all contracts; whilst general history will show you that it has, in all enlightened countries, been based on

the principles from which we have argued its necessity and excellence.

2. PARENT AND CHILD is the second relation which is found in primary society; and this is a topick which will not detain us long.

Casuists have not agreed as to the origin of the dominion exercised by the parent over the child, and have sometimes referred it to the mere act of generation; for, say they, as God is entitled to our obedience because he created us, so our parents, who begot us, hold a rightful dominion over us, as they were the immediate agents in bringing us into existence. Both parts of this proposition, however, are perhaps equally false; for as it would seem that the obedience due to God, springs from our gratitude for the blessings with which he has adorned life, and from the sway which he possesses over our happiness, and not from the mere act of creation; so the dominion of parents is more justly derivable from its utility and necessity, and from the obligation imposed by their tenderness and numerous services, and by no means from the important agency they had in our production, in which there can be no merit whatever, but positive unworthiness, if it be not succeeded by those cares and offices in rearing the offspring, which can alone fit them for the rational enjoyment of their existence. On this subject, indeed, there ought to be no collision of opinion. Paternal authority, there can be no doubt, is founded on these two titles; first, the injunction imposed on parents by nature, of rearing, and carefully watching over the moral, religious and physical education of their progeny, and the impracticability of advantageously discharging that duty, unless children yield implicit obedience to the dictates of parental concern, seeing that they are not of sufficient age and discretion to limit the measure of their submission or obedience. Every duty necessarily implies the rights essential to its performance. The care of pa-

rents were mostly thrown away, if they possessed not the right of enforcing compliance with the injunctions which that care suggests.

The second title on which parental authority reposes, is the presumed consent of the offspring. The parent shows himself ready, by the care and affection manifested to his child, to watch over him, and to supply all his wants, until he shall be able to provide for them himself. The child, on his part, receives these acts of kindness; a tacit compact between them is thus formed; the child engages, by acts equivalent to a positive undertaking, to submit to the care and judgment of his parent so long as the parent, and the manifest order of nature, shall coincide in requiring assistance and advice on the one side, and acceptance of them, and obedience and gratitude, on the other.

Puffendorf remarks, that this doctrine of implied consent on the part of the child, has been objected to as supposing a freedom of choice which cannot be supposed in the case, until he has attained the age of choice. The objection is specious; but in this, as in all other cases, reason, or the law of nature, supposes a contract on the part of the child, because it presumes a contract on the part of every individual of mankind, to do that which is proper for the particular interest, and conducive to the general good; and in this general principle of utility, (which, with Dr. Priestley, we assume as the basis and measure of the natural law,) may the first ground also of parental authority be included; and thus are both titles, in fact, resolved into the obligation of parents, and the correlative duty of children, to do nothing that shall impair the complete discharge of that obligation which springs from the natural fitness of things, or acknowledged utility.

If parental power arose not in truth from these principles, but from some fancied property given to the parent in his offspring, by the act of propagation, it would seem

to follow, as a natural illation, that this authority would appertain in the largest degree to the mother, since she not only has the pains and deprivations incident to gestation and parturition, but is the principal sharer in the cares which succeed the birth. Yet it is the father who holds and exercises the principal authority, except in the case of promiscuous intercourse, where the issue necessarily belongs to the mother, as the father cannot with certainty be known; or where, in the words of the maxim, '*Partus sequitur ventrem.*'

Such being the foundation of parental power, it remains for us to inquire into its extent and limits. No very certain rule can be given on such a subject. Like the limits, indeed, of all other government, its extent and boundaries are prescribed by the good of the subject over whom the authority is exercised, and are not to exceed what is necessary for the due control and discipline of the child. This power has been considered by various writers to be of three kinds, according to the age or condition of the child. These conditions are, first, Infancy; secondly, Majority, the child still remaining under the parental roof; and, thirdly, Majority and Separation, the child having ventured into life, the pursuer of his own fortunes.

During the first period only, can the term, parental power, be used with strict propriety, since at that period, when the judgment of the child is naught or immature, the constant and arbitrary direction of the parent is requisite for his control and preservation. The authority of the parent is strictly parental only at this period, because when the child reaches the second stage, viz. that of full age and mature judgment, but continues a member of his parent's family, the authority exercised is rather that of a master of a family, than of a parent; and the third period, viz. that of separation from his home, leaves no relation between them, save that of veneration for age, deference, gratitude

and respect for parents, on the one hand, and a continuing tenderness and affection for the offspring, on the other.

It is in the first period, therefore, that the principal questions arise regarding this species of authority; as, for example, whether the original power over the child is vested in its mother, and derived through her to others, or whether the paramount authority resides in the father; whether parents may expose their children, or deprive them of life, for gross deformity, great imbecility, their crimes, the want of means for their support, or for any cause whatever; whether paternal power may be delegated, and, if so, to what extent; whether parents may sell their children, &c. all of which, and many like questions, have been at various times, and in different nations, gravely argued, and affirmatively answered; and the rights claimed under them, have been, and still are exercised by some of them with great severity.

Paternal power, amongst most ancient nations, was absolute, the child being esteemed the property and slave of the parent. Life and death were at the discretion of the parental master, and the unnatural right of infanticide was not only recognized as legal, but so extensively practised, that among the Greeks the goddess Infanticida was supposed to preside over these atrocious outrages on humanity. Even in the present age, it has been practised to such an enormous extent in some of the eastern nations, that, if we are to credit the calculation of Mr. Duncan, there were no less than 30,000 infants sacrificed annually in the peninsula of Guzerat, and the contiguous provinces of Kutch and Sind. Owing to the laudable exertions of the East India company, this cruel practice has been considerably diminished in India, particularly in Guzerat; though in Kutch and Sind it still remains.*

* In a recent narrative of a journey through the upper provinces of India, by the late Lord Bishop of Calcutta, the Rev. Mr. Heber, the learn-

3. MASTER AND SERVANT is the last relation of primary society; in regard to which it seems necessary to distinguish between a servant and a slave, though Puffendorf and others use these terms indiscriminately.

A servant is one who affords his labour in consideration of hire, and whose servitude originates in his own consent. A slave is one who is obliged to labour, and to submit his actions to the will of the master, in consideration of the supply of the bare necessities of life, his state being generally indefinite in duration, and involuntary in its origin.

ed author speaks of female infanticide as still greatly practised in that country. He ascribes the continuance of this cruel practice to the united operation of pride, poverty, avarice, and a gross superstition. It is considered highly disgraceful in a noble family to have an unmarried daughter, and still worse to marry her to one of inferior rank; whilst the poverty of parents is often such as to prevent their suitably portioning their daughters. Add to this, that it is a current belief among these people, that the 'evil powers' are appeased by the sacrifice of a child. Most of the females of a family disappear in a manner not exactly known. The popular notion of the strangers in the country is, that they are usually drowned in a large vessel of milk, immediately after their birth: And others say that they are destroyed by opium. In the island of Ceylon alone, the census of 1821 showed an excess of 20,000 males over females; and in some districts the proportion of the latter to the former does not exceed one half. It is said that on the birth of a female, an astrologer is consulted, and the child is inevitably sacrificed if it be pronounced to have been born under evil auspices.

Mr. Heber thinks that, notwithstanding the great exertions of Major Walker at Guzerat, the number saved is small, compared to that of the victims. He relates, however, that 'previously to Major Walker's departure from Guzerat, he received the most affecting compliment which a good man could receive, in being welcomed at the gate of the palace, on some publick occasion, by a procession of girls of high rank, who owed their lives to him, and who came to kiss his clothes, and throw wreaths of flowers over him as their deliverer and second father. Since that time, however, things have gone on very much in the old train, and the answers made by the chiefs to any remonstrances of the British officers is, '*Pay our daughters' marriage portions, and they shall live!*' Yet these very men, rather than strike a cow, would submit to the cruellest martyrdom.—2 Heber's Narr. 69. 192.

The state of mere servitude is therefore easily accounted for in primary society, and might have its rise in any the most primitive state of man, as well as in communities of regular government and laws; since it might arise under any circumstances which rendered difficult the obtainment of a livelihood, there being nothing strange in a man's giving his labour to another, in consideration of some desired equivalent.

But slavery must arise from different circumstances, perhaps was wholly unknown to primary society, and is more difficultly reconciled to the law of nature if indeed it be at all reconcileable to it. This, among casuistical jurists, has always been a topick of considerable difficulty. We cannot, for instance, impute slavery to the legitimate exercise of superior minds over those which are confessedly inferior, since every man is essentially free to direct his own actions, however incompetent he may be to it, unless he be an infant, an idiot, or a lunatic. Nor can we resort to the notion of Mr. Hobbes, that the natural state of man being that of warfare, any one has a right to invade another, and reduce him to slavery by the right of conquest. So, also, the position of Puffendorf and others, that, as an enemy in a war just on one side, may fairly be killed, so the victor may make his bargain with him, giving him life on condition of perpetual servitude or slavery, seems extremely questionable. It must be allowed that there are innumerable wars where the vanquished are not so much in fault as to merit a punishment so severe and lasting. But the right to reduce to slavery is said to be founded on the right to destroy life in a just war. No such right exists, we apprehend, except *dum fervet opus*, whilst the battle rages, or in very special cases. If such cases exist, it would be very questionable whether those could be so considered, where the victors could with propriety commute the punishment from death to slavery; for

this very right of depriving the vanquished of life, would seem to occlude those facts and circumstances which would render it proper to grant them life on any terms. Perhaps the only case in which slavery would be justifiable, is one which in fact can hardly be supposed to occur in primary society, or indeed in any relation of man: it is where a body of men have shown dispositions so hostile to others, that it is requisite to the safety of the last, that the first shall be separated and restrained. Now such a case can scarce be supposed before the institution of civil government; for in primary society there could hardly be a body of ill disposed individuals so numerous as to require such dispersion, nor such an association of injured persons as could serve the purpose of dividing them, and thus coercing their good behaviour. And where the societies are political, other means could perhaps be in all cases resorted to. The right of slavery, if it exist at all, must, we suppose, be founded on the necessity for security or for punishment, or for both. Now, if individuals, or large families, (for we cannot suppose any other injured entities in primary society) were to detain persons in slavery, it is difficult to imagine how the mere end of security could be reached, such security being generally the result of the superiority of the victors in number and power. If we proceed on the principle of punishment, this will hardly excuse an unlimited enslavement, as punishment is to answer the ends of correction to the individuals, and example to others, and is necessarily limited in its nature, because it is supposed to be proportioned to the injury or crime. In short, the principles both of security and punishment are limited, because they should be adjusted to the case, and cannot justify what is admitted to be perpetual in duration, and with no other bound but the will of the master. But the case which is generally supposed to be the foundation of slavery, is compounded of these principles, and also of a sub-

sequent necessity which their exercise is supposed to induce. Thus, a community being harrassed perpetually by another of essentially predatory or restless habits, sees no other security than subduing them, dividing them among themselves, and exercising a scrutiny, and a discretionary power over them. Afterwards, they know not how to get rid of them, for they can neither release them, send them abroad, nor admit them to equal privileges at home; a situation necessarily productive of hostility on the part of the slave, and of augmented severity on the part of the master. But, to say nothing of the many innocent persons involved in an indiscriminate punishment of this sort, it is obvious enough that there are various other preferable methods of security; such as giving them in the first instance, or after a time, a limited privilege of citizenship; dividing them into very small communities remote from each other, yet retaining their liberty; and many others, short of either of the plans mentioned, but which would answer the end proposed. The above remarks are founded on the supposition that it is a body of persons that are thus reduced to slavery, by another body of persons. Let us now see how the case stands between individuals. I am, let us suppose, an individual in a state of nature, and have accumulated by labour or skill, some quantity of the necessaries of life. An unjust man assaults my life, and carries off the fruits of my toil and skill; I pursue and capture him; and as revenge is not less forbidden by the law of nature, than by the revealed law of God, I detain him for the two purposes of punishment and reparation. The punishment must be proportioned to the correction to be made, and the example to be enforced; and the reparation must be made to the amount of the property taken from me, and the actual damage which I have sustained. I have therefore a right to restrain the liberty of this individual so far as may be necessary for the purposes of punishment; and, also, to direct

his labour to my use until I am fully compensated. This, and this only, is the measure of the right of war and conquest; a measure which, it is obvious, is far from reaching to the extent of rightfully enslaving the captive, that is, of giving to the conqueror an unlimited dominion over his person, his actions, and his property, however it might sometimes happen that the offender's whole life might be insufficient to atone for the injury, or repair the damage.

Let us now, in a few words, consider the situation of the offspring of an enslaved enemy. These, it is conceded, are not participators in the offence of their parents, and therefore the same reasoning is altogether inapplicable to them. How, then, is the retention of these in perpetual bondage to be defended? Can it be said that there is a contract on the part of the infant slave, with the master, as of the child with his parent, to remunerate him for his care and expense in rearing him? We think not: for between parent and child there is no actual consent; it is merely presumed from the heavy debt of gratitude, tenderness and affection due by the child; and also from the moral fitness of things, which demands obedience in order to enable the parent to discharge his duty. But such an implication cannot well be presumed in the case of the infant slave; for he has received no such tenderness, careful nurture, or expensive support; and if all this, and much more, had been practised towards him, the obligation would not be that of slavery for life. Still, however, two considerations have been urged regarding this point; first, that the claim for remuneration, which I have mentioned to be one of the ends of slavery, might survive the parent, though the right of punishment would not; and secondly, that as the only inducement of the master to preserve the life of the infant slave, whose parents can subserve no interest save their master's, is the hope of eventual profit from his labour, the law of nature may be supposed to raise a duty on the side of the

slave, to repay by his services the preservation of a life which would otherwise have been disregarded; and this might be called the policy of the law of nature. The whole of this reasoning appears to me entirely fallacious. The claim to reparation may, indeed, survive; but only so far as to give the master a claim to any property the slave may possibly have accumulated, and, even then, only so far as the original debt may have remained unsatisfied; but this surviving claim cannot *per se* be a personal charge on his offspring. As to the supposed inducement of the master to preserve the life of the infant slave, and the imagined policy of the natural law, nothing, it appears to me, can be more sophistical and erroneous. It is founded on an assumption that the master can rightfully be regardless of the lives of such persons, (whose parent he certainly must have taken *cum onere*;) and also on the supposition that he has such an exclusive right to the enslaved parent's labour, that such parent is not entitled to have, and to rear children; and, further, that the law of nature, like human laws, can compromise for wrong on principles of policy; all of which positions, we apprehend, are erroneous, and have been so considered in the preceding lecture, when we had occasion to speak of the unalienable nature of some of our rights.

We have now briefly examined the three great relations of primary society, or that primitive association which would be essential to the happiness of man, how much soever his desire to do justice might render civil government and laws unnecessary.

We now proceed to the remaining topicks of the present lecture.

(2) Of the Motives After the establishment of primary
which induced men society, the transition to that of political
to establish civil so- government and laws has been variously
ciety and govern- accounted for; and different writers, an-
ment. cient and modern, have supported their respective theories
with zeal, and often with great ingenuity. Before we ex-
amine these theories, we would remark first, that it has
been at all times a fruitful source of error, that theorists
are so prone to build their system on some single or ele-
mentary principle, instead of taking an extended view of
their subject; and seeking for its solution in the operation
of a multiplicity of causes. This desire to refer an effect,
originating in complex causes, to a simple principle, ap-
pears almost innate; for it will be found, on examining va-
rious theories in physicks, and morals, that scarcely any of
their authors have been content to rear their system on the
resulting effect of concurring causes, but have imagined
that their argument loses the character of theory, and the
charm of novelty, if they solve their problem by reference
to all the circumstances which may possibly combine to
produce a single result. This notion of simplifying the
composite machinery of nature, and of attributing to one
cause, what may have arisen from an infinite number, of
minute operation, has, no doubt, been the source and per-
petuation of most of the visionary systems which have
been the reproach of learning and philosophy in all ages.
We know that the human mind is composed of faculties
extremely implex and delicate in their operations, but in
which the most wonderful and undeviating harmony is pre-
served. All its parts have a dependence on each other
strictly reciprocal; and no spring of this admirable piece of
mechanism can be set in motion, without in some degree
exercising all the others, however minute and insignificant
they may appear to be in the great whole. An attempt,
therefore, to refer most of the operations of the human

mind and heart to a single source, or to derive from one spring of action, effects depending on a complication of causes, is highly irrational, and has generally proceeded from an overweening zeal in support of some favourite theory. The *second* remark which we have to make, before we inquire into the opinions advanced as to the origin of civil governments, is that the foundation which we adopt as the main guide in ascertaining the law of nature, is utility: in other words, the mischief that would result from the disobedience of its dictates, is the sanction of the law of nature. It must, however, be quite evident to all, that this general utility is neither always discernible to men without government and laws, nor is always correctly argued from by casuists themselves, nor alterable as circumstances and necessities vary. There is generally this difficulty in determining the justice of an act, under the natural law, viz. that what men were designed to be, and what they invariably are, seem to require two distinct measures of action; a difference to which the most virtuous casuist cannot be entirely insensible. Thus, for example, the retention of the offspring of a slave, we have just seen, has been attempted to be justified on a supposed policy of the law of nature, in order to avoid a greater evil. This would certainly present a dilemma, about which the virtuous and considerate might innocently differ. We think, however, the case is free of difficulty, and that no such policy exists. It is conceded that no right can be founded in an injury; and such an acquiescence of the law of nature would be an indirect sanction of that which in itself is clearly a violation of justice. Others, however, are equally confident that such a policy must be consistent with the *lex naturæ*, because so great an evil might unavoidably arise from denying to the master any interest in the infant slave. Variety of opinion often preponderates on the side of error, and truth is sometimes obscured, for a time, by the voice of even general opinion

against her, and this too in matters even of feeling, conscience, and obvious reason. But it is full time that we now proceed to direct your attention to various opinions assigned by authors as to the origin of civil or political government, and laws. This, together with the obligation to it, it will presently be seen, we refer in a great degree to the utility we have just spoken of, and which we shall have occasion fully to explain hereafter.

1. DIVINE COMMAND. Some have contended that the first institution of civil society and government, was in compliance with a divine command. They suppose that Adam was invested by Deity with supreme *political* authority over all his progeny, and that the right of government descended as an inheritance in the elder lines of the several branches of his family. That this is a hypothesis wholly destitute of historical support, is very evident, as we can refer to no other source than the Bible, and no such doctrine is there to be found. Independently, however, of the absence of historical evidence on this point, we can see no occasion to have recourse to this intervention of divine command, since there is clearly a sufficient obligation urging the establishment of such societies, arising from the numerous benefits which flow from them, and the avoidance of many evils which obtain without them; nor is it ever philosophical to impute any effect to divine agency, which can be otherwise satisfactorily accounted for.

2. THE SOCIAL PRINCIPLE. A second theory supposes men originally solitary animals, wandering in the woods and fields in search of food, and, like the beasts of the forests, occasionally meeting in their excursions. Finding from this casual intercourse, that they could be reciprocally advantageous to each other, and nature having, in fact, implanted in them certain social affections, they thus formed those simple associations, which, in process of time, became subjected to a few plain regulations, chiefly in refer-

ence, perhaps, to hunting, the division of their spoil, the sanctity of their humble habitations, and such like; and finally matured into regular governments or nations.

3. SENSE OF IMPOTENCY. Another hypothesis on this subject, assumes that men are the most helpless of all animals; that it was not the social principle which first induced them to come together, but a sense of impotency, a knowledge of their total inability to sustain themselves separately against the inclemencies of the seasons, the ferocity of animals, the inroads of hunger &c; and that laws, and political government were coeval with the first associations of man; or, in other words, that a state of primary society perhaps never existed, but that the earliest associations were political, though they may have been extremely simple, and scarcely distinguishable from primary society, in the sense in which we have described it.

4 NATURAL HOSTILITY. The theory of greatest note, is that of the celebrated Hobbes, which makes the original principle of all societies to be fear, and a natural hostility of man against his species. This doctrine supposes that some men united for defence, and others for aggression; that as mankind are naturally enemies to each other, they soon found that their schemes of opposition and plunder were better promoted by a union of action; and that this being the case, those who were attacked would in turn unite for their defence. If Mr Hobbes's notion be correct, it is not very material to inquire whether the first communities were aggressive or defensive. We cannot, however, agree with a late sensible writer on Political Economy, Mr Raymond, that the first associations must necessarily have been for the purposes of aggression. He appears to have adopted this idea of natural hostility to its utmost extent. 'It is very clear,' says he, 'that aggression must precede defence, and that before communities could have been formed for defence, there must have been others

formed for aggression. Had there been no such thing as attack, men would never have thought of defence. The primary object, therefore, in forming the social compact, must have been plunder, and the first article of that compact no doubt was, 'we will plunder our neighbours.' The second article probably was, 'we will not plunder each other:' this article was necessary to enable them to carry the first into effect. Other articles were afterwards added, as the occasions and necessities of the society required, until the social compact has increased to its present form and dimensions.* This view of the subject by our countryman, is perhaps an extension of the theory of Mr Hobbes beyond the limits designed by that learned but misguided philosopher. He, indeed, considered men inclined to rob and oppress each other; but it is not a legitimate inference from his theory, that political associations were first formed for the express object of aggression and plunder: for the evil dispositions of men may reasonably be supposed to have induced the better disposed among them to unite for the purposes of defence, or even to regulate their own evil habits and propensities, after their experience had taught them that there was no safety nor tranquillity, if the uncontrolled indulgence of predatory warfare were not checked. But be this as it may, there are few, if any, in this enlightened day, who will concur with Mr Raymond in a doctrine which places our species in an aspect still more hideous than that in which we find it in the description of Mr Hobbes. We do not perceive the necessity of supposing that the first political communities were formed for plunder. It is true, no doubt, that defence must be preceded by aggression, and that no defensive communities could have been formed unless there had been previous aggression; but there is no need that this should

* Raymond's Political Economy, vol. 1. 19.

be of communities, and they, too, formed expressly for assaults. May not individuals or families have manifested those evil and aggressive dispositions which would give rise to communities for defence; and if so, may not the first civil associations have been formed merely for defence against such individuals and families? The whole question is, whether defence or aggression was the cause of civil union; and to infer the latter merely from the principle, that aggression must precede defence, is a manifest sophism, by departure from the point in controversy: it is what logicians call *ignoratio eluchi*, since if the postulate be admitted, as it must be, that aggression precedes defence, still it goes no way to justify the conclusion that the aggression was that of a community, as it may have proceeded from individuals, whilst those who were injured, may have associated for defence, and thus originated the first civil communities.

The truth, no doubt, is, as is generally the case in such controversies, that these societies were formed neither for the one nor the other purpose solely. Men may have united from a great variety of causes, such as relationship, social propensities, the advantage of union in labour &c. and even if men are natural enemies to each other, they are also, as we know, reasoning beings, and may therefore have easily arrived at the conclusion, that an association of numbers of their own species, under certain simple regulations, might be productive of much advantage. The theory of natural enmity is, indeed, a shocking and disgusting view of the character of that being which, on earth, is the only one endued with reason, and capable of society. We had hoped the day was past, when any of the cold and sullen sophistry, or the wild and incomprehensible figments of Mr Hobbes, could have found an advocate.

5. THE URGENCY OF OUR WANTS. A fifth theory has accounted for the origin of societies wholly from the se-

verity of our wants in primary society, as well as in a state of nature. A thousand urgent calls, which men or families unallied, however much they toiled, could not have provided for, must have linked them together; and a thousand pleasures to which we are naturally addicted, would have subsequently cemented the society thus formed. That these considerations would have united men, and given rise to political regulations, cannot be doubted; and if the state of nature ever existed, its miseries must have urged men to society and law, unless mankind had been separated by a repulsive principle of which we can perceive no traces in the present nature of our species.*

6. **SEXUAL PASSION.** The merit of originating society and government has also been ascribed to the attachment of the sexes. The mode in which this proclivity of our nature operated in producing this effect, must have been, we presume, somewhat after the following manner. The sexes were first brought together by the influence of sexual passion, allowing that to have been the sole attraction to union: marriages, with all their consequences, would ensue: the numerous ties of relationship would bring numbers together, and extend the dominion of family affection and influence: the social principle would be set in operation, and give rise to friendships among many, beyond the limits of blood and affinity: all these would unite for every purpose of common interest: these objects of union would require rules for their regulation; and as they increased in importance, more permanent confederacies would be established, and thus give rise to regular governments and laws.

7. **THE LOVE OF KNOWLEDGE.** This has likewise been regarded by some as the foundation of civil union. Its ad-

* This view of the subject differs, if at all, but little from the third one, which refers the origin of society to a sense of impotency.

vocates have not been very explicit in stating the *modus operandi* by which man's thirst for knowledge terminates in such an important result. We may suppose it to have been thus. Man, as we know, is a being endowed with observation and reason: these beget curiosity, or a desire for knowledge. Man awakens the curiosity of man, and would be as likely to be observed and studied by man, as any other object in nature, and even more so, as the similarity of his ostensible nature and pursuits would excite a livelier interest. This desire for some knowledge of our species, would bring men together: friendships, marriages, common enterprises, and, in fine, primary societies, would soon be formed: knowledge on various subjects would be desired: the general mind would expand: the objects of curiosity and research would greatly multiply: these could not be advantageously pursued without union of action, and the adoption of some rules: these rules would multiply, until their enforcement and exposition would demand a common force, and a common tribunal. Some distinguished expositor of these rules would gain an ascendancy: his worth and talents would gain him authority: he becomes a governor, and perhaps, finally, a king.

8. PATRIARCHAL GOVERNMENT. The last theory we are aware of is, that nations arose from patriarchal government. This supposition appears to us the most probable, and is the best sustained by the early history of our species. Patriarchal government consisted in the fathers of families, and their first born after them, exercising civil, ecclesiastical and economical authority in their respective households. The simplicity of primary society in all countries, and in all ages, would require no other power than that of a father of a family over those under the same roof: but the patriarchal government to which we allude, is that which obtained among the Jews from their earliest history, until their settlement in Egypt. During their residence in the

land of Canaan, they had no form of civil or political government. The fathers of families exercised sovereign power over their children, who were disinherited by them, or punished with death, or dismissed from their homes, or blessed or cursed, as the parent should determine, without any interference by any foreign power whatever. These patriarchs even concluded solemn treaties with the petty kings who had dominion in various parts of Palestine, and were considered their equals in dignity and power. On the death of a parent, his eldest son succeeded to the parental or patriarchal authority, and this being sacerdotal as well as secular, embraced every power which their necessities demanded.*

The process by which this species of government would mature into political power, may easily be conceived, and needs no explanation. A knowledge of the nature and benefits of civil union being once known to the first progenitors of our race, history or tradition would seldom, if ever, suffer it to be entirely lost, and thus it is that all the nations of the earth are indebted for their exemplar of civil society, to those primitive political associations which spring from the patriarchal dynasties of which we have spoken. The student, if desirous to investigate the nature and extent of patriarchal authority, may consult the authorities in the margin.†

We have now concluded our remarks on the various theories advanced to account for the origin of society and government. We have dwelt longer on the subject than was perhaps necessary, as many of them are the fancies of speculation, but still, when taken together, give us a tolerably correct view of the actual origin and progress of nations.

* Gen xiii. 6. 12; xiv. 13. 18. 24; xxxi. 44. 54; xlix. 3. 4. et passim.

† Jennings' Jewish Antiquities, 1 vol. 100. Harrington's Works, 241. 331. 332. Sydeney on Government, chap. 1, sec. 7. Puffendorf, book 7, ch. 3, sec. 6. Horne's Introduction, vol. 3, part 2, chap. 1.

They also show us how unphilosophical it is to impute the origin of these institutions to the operation of any single principle, and that probably nearly all of them concurred in their production.

Let us now briefly advert to some of the benefits conferred on man by submission to positive laws, and the various institutions of civil society.

1. We have had occasion to speak of the uncertainty of the law of nature, or rather the difficulty of knowing its prescriptions under particular circumstances; for though this law be not dumb, it is sometimes not easy to understand its injunctions. Be men's inclination to do justly what it may, they often want time and talent to come to correct conclusions regarding what is just; nay, in many cases, there wants rather a consent to take one of two paths which are indifferently right, than judgment to decide which is best. Innumerable cases occur in the most simple relations of life, in which, for example, the hunter, the artificer, the labourer cannot stay to form a deliberate judgment: in such cases, it is in the law of nature, as in the municipal law, less important what the law is, than that it should be fixed. Now civil society is intended to remedy this difficulty: men submit themselves to some common head, or select the most able minds from the mass, to consider what rules will be best promotive of general good, under the particular circumstances in which the community may find itself; and hence originates the legislative power of government.

2. A not less essential circumstance than the directing of men's minds by the common understanding, is the subjugation of their wills by the common force. As the former is creative of the legislative power of a community, so is the latter of the executive. Though the tendency may be to good in the main, there are, we know, sufficient restless spirits to be found, who disturb the con-

cord of the many, and therefore require the union of the majority for their speedy and certain correction. Nor is it necessary, as has been shown, that we should resort to a prevalent evil principle in man, since, as Puffendorf well remarks, 'if out of the whole multitude of mankind, each man had but a single foe, this were enough to fill the whole world with hatred and dissention.' A competent force, therefore, being provided for the execution of the laws of policed societies, renders legislation efficient, and compels the observance of laws, where virtue and good morals are not sufficient to maintain their supremacy.

3. Although we have differed from those jurists who maintain that man resorts to civil society immediately from the social principle, yet it is evident that mediately this principle is an essential, and perhaps a primary cause of simple association, and may, with others, have tended largely to the production of laws and regular governments. Men, doubtless, might indulge their love of society in a good degree, might trade and contract together, and enter into many other relations, in mere primary society; but as the social affections expand, as the ties of relationship increase, as numbers multiply, there arises more and more necessity for some clear arrangement of the rules of order, a fixed source for their emanation, and some strong and prevailing power to control the heedless and the base, and finally, to see that all the rules prescribed shall be obeyed. It is thus that the social principle may become strongly though mediately operative in the production of political societies or nations.

4. The foregoing principles enable us to explain why all mankind are not one civil society; but are found parcelled out into numerous political states, larger or smaller according to choice or circumstances. As all these associations have principally in view the constitution of a common understanding for legislative purposes, the society

must not be so large as to render this difficult, either as to the collection of the common will, or its communication to the common force which is to have in charge the execution of that will. We need not advert to the various accidents which have, in fact, produced civil societies, as we see them exist every day. These topics will be more properly remarked on, when we come to speak of the various forms of civil government, and the principles on which they are based.

5. It has not been our design to enumerate with exactness, or to discuss with precision, the numerous advantages and motives of the adoption of regular governments; the perception of which *à priori* by mankind, may be supposed to have influenced the transition from a state of nature to that of primary society, and then to that of political. These inquiries lead to useful results, though, in point of fact, such progressive changes may never have taken place. In conclusion, we may mention another great advantage derived from civil society, which is, that men obtain thereby the full benefit of exclusively exercising those peculiar talents with which nature has endowed them. In primary society, every father of a family must be supposed to act, in some degree, the part of a legislator; he must establish some rules of duty, attach some penalties to the neglect of them, and therefore must either learn to think on matters infinitely various, and often much beyond his comprehension, or must be content to observe and borrow such as he finds most beneficial in the families of his neighbours. Civil society, on the other hand, leaves every one at liberty to mind his particular or favourite occupation; while on exalted genius and knowledge is devolved the task of planning the government and laws, and, in turn, this genius and learning are discharged from all humbler callings. Enough, however, has been stated to show the powerful obligation imposed on man to cultivate political society.

It is the most efficient guard of his felicity, and the surest promoter of all the ends of his being. Under this view, and to this extent only, is it that government is referrible to a divine command, and thus may we, also, understand Aristotle, when he denominates man a Political Animal; for he, doubtless, is a political being, whose happiness cannot be secured, whose acquisitions cannot be guarded, whose faculties cannot be expanded, and whose nature cannot be exhibited in its vast power and variety, without this species of association.

(3.) History, and a knowledge of man's moral and physical nature, are more to be relied on than political systems. In bringing this lecture to a close, I have to remark that the science of government and politicks is much more indebted to authentic history, and an accurate acquaintance with the moral and physical constitution of our species, than to the theories and speculations of philosophers. It cannot be doubted, however, that the learning, zeal and ingenuity displayed in these investigations into man's natural state, and his progress to political refinement, though based on much speculation, have contributed in no small degree to illustrate the science of natural jurisprudence, and to fashion our minds to correct views in political philosophy. But in order to avoid error, we must study human nature in all its varieties, in all ages, and in all countries, and be always careful to separate history from fable, the latter being by far the greater portion of a great deal that is called history. Political wisdom, also, will be found to be the offspring of experience, not of theory; and history is the record of that experience, and its results. From this source must we derive those lights which experiments shed upon the speculations of men; and to these only will students look, as the lamp and clue which are to direct them to the adytum of truth.

——— Hinc orantibus
 Responsa dantur certa.

LECTURE V.

OF THE RIGHT OF CIVIL GOVERNMENT.

Introduction. THE motives which possibly induced men to establish society and civil government, having been sufficiently considered in the preceding lecture, we are now to discuss the Right of civil government, and to ascertain the limits of that right, by reference to the objects which government is designed to attain.

Civil government, whether viewed as an improved modification of our primary or simple association, or as a necessary evil springing from the multiplication of our numbers, and of our mutual transactions, must, in either case, be subject to the limits prescribed for the accomplishment of its purposes: for if we look on political union as an improvement, we must measure and conduct it according to the objects contemplated in that improvement; and if we regard it as an evil, we must then view it as a sacrifice of some good, and some liberty, for the security of other goods, and of our remaining liberty, and it were obviously unreasonable to carry the sacrifice beyond the bounds dictated by the clear necessity of the occasion. We are therefore to consider civil government in no other light than as an association of men for the production and preservation of good order; a good order which is to be purchased by yielding up in some degree the liberty of self-control, but which yields, or should yield, in return, the advantages of

secured liberty and property, and of the tranquil discharge of all acts and purposes essential or convenient to human happiness. Viewed in this light, civil government is an institution established for the happiness and advancement of the governed, and not, in any degree, for the advantage and aggrandizement of those who govern.

(1.) The right of civil government is either Original or Subsequent. Few questions have been discussed with more warmth, or given rise to a greater display of learning, than that of which the object is to ascertain the true relation between governors and governed. The right of civil government has been at all times a topick full of interest, no less to the admirers of despotick power, than to the zealous advocates of humanity. If the sycophants of royalty have, in all ages and countries, been watchful of the interests of their masters, the people have not been uniformly submissive to their guidance, but have chosen sometimes to understand and to vindicate their own rights, or to listen to, and be directed by the superior intelligence of a few in whom they could justly confide.

By the right of civil government we mean the source or tenure of civil or political power; or, in other words, the right by, or in virtue of which, those exercising governmental powers do rightly claim to exercise them. The government *de facto* is to be distinguished from the government *de jure*, though the former may be wisely and virtuously administered, and the latter weakly and viciously. An inquiry into the origin and motives of civil government, (which was the subject of the preceding lecture) terminates with an investigation of the facts, actual or presumed, which induce men to submit to it; but the right of civil government demands a further inquiry; and we are then to examine into the tenure, and legitimate source of the power claimed by those exercising political rule.

These topicks are all closely allied; and hence the subject of the present lecture is the natural sequel of the preceding.

The right of civil government may be considered, first, as ORIGINAL, and secondly, as SUBSEQUENT. By the original right of civil government we mean that which arose on the establishment of the particular government, and which flowed from the original source of power, whatever that may have been, to those first receiving it, and whatever may have been the form of government then adopted. By the subsequent right of civil government is understood that which subsists during the various changes that take place in the form and circumstances of the government, in the persons exercising the political rule, and in the members of the community over which it is exercised. Thus, for example, if a man be selected as the chief of an infant community, in him resides the original right of civil government. If his son succeeds him in this power, or if he himself should happen to survive all those from whose choice his right originally flowed, the right, if any, by which he continues to rule, or that of his successor, would be the subsequent right of civil government.

To ascertain the foundation or source of this right, original and subsequent; that is, to determine on what principles, and by whom, and for whom it was first established; how the posterity of the original framers of this government are bound to obedience; and how the reciprocal obligations of those who rule, and are ruled, are continued throughout the various changes to which we have alluded; have, simple as they are, been the topicks of much discussion, and will form the only matters of inquiry in the present lecture.

(2.) Of the original right, supposed to arise, 1st, from Divine Command; 2d, from the Consent of the Governed.

Some writers have ascribed the institution, not only of primary and civil society, but of all political government, to Divine Command. They suppose that society and political rule in the abstract, are of divine ordinance; that the right of all civil government, whether original or subsequent, must be referred to this high source; and that if even the consent of the governed be impliedly, or ever so expressly manifested, this is merely in accordance with a previously existing right, derived from the fountain of all power. In the preceding lecture, when speaking of the origin of society, we stated our reasons for dissenting from the theory which ascribed the institution of society to divine command. So, we think, sufficient motives may be easily pointed out as the source of government in fact, and to evince its rights and obligations, without recourse to any injunction from heaven. We conceive that political communities are to be upheld or rejected on precisely the same grounds by which innumerable other dictates of the law of nature are demonstrated, viz. by their conduciveness to the good or prejudice of man. This is the great principle to which all others must be reduced, and to this, as we shall endeavour to show, all other principles to which the right of government has been referred, such as possession, inheritance, prescription &c. &c. as far as they are in any degree operative, are reducible at last.

We have reason to thank the diffused good sense of the times, that the derivation of all government from the divine command is no longer pervertible to the wicked usurpations on the rights and peace of mankind, to which it has in worse days been abused, by ignorance, servility and pride. For the position that government in the abstract sprang from divine command, very naturally gave birth to the notion that 'God conferred on certain individuals, fa-

families and successions the exclusive right of political authority over the rest of their species, and imposed on others a correspondent obligation to obey them.' To such absurdities does the wrong use of phrases often betray us. To drop for the moment all consideration of the idleness of such a doctrine as respects the law of nature, and the general utility which that law is always supposed to regard, we would ask what else than the arrogance of despotism on the one hand, and the abjectness of slavery on the other, could have engendered the notion that heaven communicated a right of government even to the virtuous and the wise, much less to the weak, the wicked, the ignorant, the imprudent, and the tyrannical indiscriminately? Scarcely any supposition can be more disparaging to that Providence which directs the world, than to erect into his particular favourites, and to invest with the prerogative which approaches nearest to his own, the spoiled inheritors of hereditary rule; a race which has almost always been most ignorant and wicked in proportion as this despicable opinion has pervaded the age. But when we come to remember, (what no sound mind could well forget or overlook) that the good of mankind is the only object which the moral governor of the world can be held to entertain; that general felicity is the end and final cause of all his creation; and that utility, which is nothing more than general and durable good, is constantly proposed to us in all his laws, whether collected from the physical or moral creation, it seems highly absurd to imagine any other foundation of the mutual rights and obligations of civil government. It is true that the *jure divino* government of kings has not been the notion merely of barbarous ages and people, but has been a political dogma almost of our own day, and been sustained by a nation eminent in wisdom and virtue; forming one among numerous examples of the slow advances which have been made in political

science in all countries, and in all ages of the world. It would indeed seem infinitely strange, if equal and greater absurdities were not discoverable in every stage of human opinion, that princes should have been deemed the peculiar favourites of heaven, or, to use the language of Dr Paley, 'to be ordained of God by virtue of any other than that general decree by which he assents, and adds the sanction of his will, to every law of society promotive of his purpose, viz. the communication of human happiness.' A principle, we would add, whereby the meanest minister or ordinance of law is not less of divine right, than the most important and equitable ordinances of the most powerful and just princes.

It is a singular fact in the history of man, that this belief of a divine right in governors has been, in all ages, and in most nations, nearly as prevalent as the other, and only sound opinion, which ascribes all political rule, as to both its origin and form, to the consent of the governed. This belief in the divine right of civil government originated, we apprehend, from two causes, viz. first, from not properly distinguishing between the moral necessity that man is under to submit to government of some kind, which is properly referred to the will of God; and that right claimed by some kings, of governing in their own way, exempt from all control or limitation from those over whom they exercise such power. It is extremely plain, that whilst subjection to rule of some kind is essential to the happiness and well being of man, and is consequently, in one sense, of divine appointment, this is altogether different from the divine right which has been asserted by certain monarchs and dynasties. Secondly, this notion of a *jure divino* political power arose from the ambition of tyrannical monarchs, whose policy it was to inculcate a belief which not only sanctioned their enormities, but silenced all opposition, since it would be regarded as sacrilegious to raise the arm of hu-

man power against the vicegerents of deity. Many kings and princes have been fond to trace their origin from some god. It is said that Numa received his laws from a deity. The founders of the imperial city were traced to the same illustrious origin. Octavius Cæsar's usurpation could be legitimated only by proving the descent of the Julian family from a goddess; and Alexander the Great, not content with his descent from those celebrated heroes, Hercules and Achilles, claimed to be the immediate son of Jupiter Ammon. So, also, the royal family of Abyssinia claim Solomon for their great progenitor, and they encourage the opinion among their subjects, that they inherit from that wisest of all men, a species of divine right of government. We know, likewise, that the Peruvians, on a similar principle, believe their Incas to be the offspring of the sun; and the dynasties of Ali and Omar rest their right of political rule on their descent from Mohammed, the prophet of God.

In more modern times, and among more civilized nations, this doctrine of the divine right of political rule has generally been considered too pregnant with evil, and, indeed, too absurd to be endured. The opinion which is now usually advanced is, that although some government is ordained of God, yet the particular form of government, and the series of laws, are to be left wholly to the wisdom and discretion of men, that is, of the governed. Hence, in the language of Milton, 'the institution of magistracy is *jure divino*, and the end of it is, that mankind might live under certain laws, and be governed by them: but what particular form of government each nation should live under, and what persons should be entrusted with the magistracy, was, without doubt, left to the choice of each nation.'* To the same effect are the opinions of Fortescue,†

* Milton's Defence of the People of England, 64.

† Fortes. de Laud. Leg. Ang. ciii, xiii.

Parsons,* Dolman,† Bellarmine,‡ Sydney,|| Plowden,§ and numerous others to whose works we might refer, were further authority necessary on such a point. In conclusion of this question we would only remark, that most of the advocates of the divine right of civil government have not distinguished sufficiently between the obligation to submit to political rule in general, and the duty of yielding to the government of particular individuals, and such forms of polity as they prescribe. In support of their opinion, they have also uniformly applied the arguments applicable only to the former, to sustain them in the latter position; and have availed themselves of a confusion thus inevitably produced, to uphold an otherwise naked absurdity; well knowing that as the author of nature required all men to submit to government of some kind, the ignorant and indiscriminating could be easily made to adopt the opinion, that particular forms of government, administered by particular families, (more especially if possessed of such power for many generations) were equally obligatory. But we now dismiss this question, (at one time of great moment,) to the oblivion to which the good sense of the day, or the diversion of its prejudices into some other channel, has consigned it.

We now proceed to the discussion of the second division of this inquiry, viz. that which refers the original right of civil government solely to the consent of the governed.

Though there has been much mistake, either ignorant or wilful, on this long debated question, we cannot but think that the antagonists have approached much nearer to each other's opinions than they have been aware of them-

* Parsons' Answer to Sir Edw. Coke, cii.

† Dolman's Conference on the Succession of the Crown, 8, 9.

‡ Bellarmine de Laicis, Lib. 3, c. 6.

|| Sydney on Government, 15, 55.

§ Plowden's Jura Anglo. 61, 69.

selves. The question between such as refer this right to divine command, and those who found it on consent, appears resolvable into this shape, viz. whether this contract, (for a contract it must be to every rational apprehension,) may rest on the same basis as other contracts, viz. the will of the contracting parties; or whether it alone of all other compacts, requires a divine interposition to establish and fortify it. If we have not assumed the point in calling government a compact, there seems to be no reason whatever for referring its obligation, in any degree, to any other principle than that which regulates all other agreements, that is, the mere will of the contracting parties. If it be a contract, it lies on those who assert that it differs from others, to prove how and why it differs. No reason, worthy of that name, has ever been assigned for referring political rule to any other origin than the consent, either express or implied, of the governed. It has rested at all times on mere assertion, forced analogies, and confused reasonings deduced from expediency, or the mere moral necessity of yielding to government of some kind. But if a particular government be not wholly independent of the consent of the governed; if it reposes, in any degree, on their consent, they may well ask for evidence of its having any other basis than that of consent. It may be here remarked, that not every thing to which a man voluntarily consents, is therefore just and lawful, according to the law of nature. It is undoubtedly obligatory on him who consents or contracts, so far as it is uncontradicted by the precepts of that law; but still its character cannot be conceived to be in the least changed by the circumstance of consent; so that justice and injustice, right and wrong, are abstractly altogether independent of man's consent. Consent, indeed, may tend to evince more clearly the probable character of an action; but it can make it neither more right, nor more wrong. How then, it may be asked,

can the right of civil government be referrible to consent, when we deny to consent the power to confer on the action a character, so as to make it right or wrong, and therefore obligatory or otherwise on him who consents? The question is a natural one, and the point demands some explanation. We have hitherto maintained that utility or expediency is the sole basis and measure of the natural law. From this we educe general rules, and to this we refer our conduct when we desire to ascertain its justness. But as God has made no man the judge of another, and as all individuals are essentially entitled to the exercise of their own judgments, whatever the difference of natural endowments may be, there can be no other depository of the precepts of the natural law, than each man's bosom; no other interpreter of its language, than his own judgment. Hence men are naturally quite independent of each other, and while they must all recognize the general convenience as the measure of their actions, each must judge, in the last resort, of the conformity of every action, or of any course of conduct, with that measure or standard. This being the case, we find that man's independence of judgment becomes itself speedily limited by that very utility or expediency, and that we must submit to certain rules which the common sense of mankind has in all times and circumstances found essential to the just order and peace of human life; and the necessity of keeping one's promise or contract, will be found to be a primary principle, very soon recognized, and fully established.

Now, in giving a promise, or entering into a contract, we express our consent, and the expression of that consent is the *date* from which the right of another, and our own obligation commence. Before that consent was given, there existed only such a right, and such an obligation, as general expediency created, and we are to look to the consent as merely defining and ascertaining a right and obli-

gation that repose on the rule of expediency, which binds us to keep our promise. Hence we see that the general happiness is the origin and measure of the right; individual independence is essential to the preservation of that happiness; that independence confers on all the power of suspending assent; but that, once given, defines the right which before was indefinite and unascertained. Thus, for example, a man already convinced of the justice of a required action, is under an obligation to God to perform it, and under a general obligation to man likewise; but as no one can undertake to decide for him, without violating a first principle of nature, one thing is wanting to confirm, or rather to ascertain the right, and that is supplied by the individual's consent. While it is therefore very true that expediency is the remote basis of the right of civil government, it is equally certain that the consent of the parties is the immediate fountain of the right; in the same way that natural law dictates marriage, and individual consent binds the parties under the immediate obligation. So that in truth, though expediency and consent should go hand in hand, yet we may properly reject expediency as the immediate foundation of political rule, and contend that consent is the true basis, although consent *per se*, and independently of utility, cannot confer the character of right. Hence, we must go a step further before we get entirely rid of the objection, that consent does not give the character of right to an action. And here it may be asked, whether the consent of men to live without the restraints of civil government, would make such a state of perfect freedom right in itself. There can be no doubt, as we have before remarked, that there exists an abstract fitness of things, independent of all human opinion, and which is perfectly suited, could we but know it, to promote the best possible happiness of the race. But as this fitness must be perceived by human judgments, before it can be adopted and adhered to

as a rule of conduct; and as it subsists only in the human mind, so far at least as it concerns man in this world, and is therefore to be seen through its medium alone; it follows that that which men, or a clear majority of mankind, consent to as expedient, just and fitting, is the only measure of that expediency, justice and fitness. These propositions are equally true whether we admit or deny a moral sense. Hence, nothing can be declared to be true, but what the mass of mankind, with the means of judging, and in the exercise of their sober senses, consent to consider as such. And it is by this almost universal consent that the expediency of civil government is demonstrated. As far as our argument is concerned, it is of no consequence that the advances to truth have been very gradual, and that the opinions of mankind on many important topics have undergone great mutations. Happily, nature has so ordered it, that the principles essential to the formation and conservation of society, have been much the same in all ages; and if our deductions from these first and acknowledged principles are not always just; if, from time to time, we discover that the track of our reasoning deviates from good logick, and that our conclusions are to be rectified accordingly; this, we say, although it may serve to show us that abstract truth, and what we think we have demonstrated to be such, may be different things in themselves, yet does not relieve us from the necessity of considering the one as the other, since there is no possibility of distinguishing them, as guides of human action. If consent, therefore, cannot make a thing right or wrong in the abstract, it is at least an intimation of what men consider such; and, as regards them as moral agents, it is truth and right, since they can have no acquaintance, unless by some supernatural revelation, with any other species of right.

Hence you perceive with what reason we pronounce that the right of civil government has its origin in the consent

of the governed; and that this is the true, the rightful, and the only source of legitimate political power.

When we come to review the various opinions as to the foundation of what is called the subsequent right of civil government, we shall find no difficulty in showing that there is no occasion for distinguishing so warmly as has been done by some writers, between expediency and consent; and that expediency, if not followed by consent, can never be the source of legitimate political power, be it original or subsequent.

(3.) Of the Subsequent Right of civil government; and 1st that this, as well as the original right, is founded on consent.

We have previously stated, that by the subsequent right of civil government is meant that valid authority by which a government, once established, is afterwards continued, either by the original functionaries, when those who were first governed no longer exist; or by the heirs or other successors of those functionaries. The title by which these latter claim to exercise the powers of government, may be the same as, or very different from that which sustained the government originally.

According to the opinion we entertain as to the true origin of civil power, a government may originally have been wrongful, for it may have been usurped by fraud or violence, and yet it may subsequently become rightful by the mere consent, express or implied, of the governed. If the original right of political rule be referrible only to consent, it would seem to follow that the subsequent right can be ascribed to no other cause;* and yet this has been doubted by some learned and able writers. Mr Macaulay remarks, that 'the division of this right into original and subsequent, had been undeserving of notice, had not some political philosophers endeavoured to maintain, that however the consent of a political community may have been originally necessary to constitute a rightful government, yet the right of a govern-

* Macau. Rudi. 140.

ment already established, may exist independently of such consent.' The grounds on which these writers would rest the subsequent right of government, we shall presently proceed to explain, and endeavour to confute. We would premise, however, that in referring the subsequent, as well as the original right, in all cases to the consent of the governed, the principle of expediency, to which we have so often adverted, is in no degree impugned: for the moment that we acknowledge the happiness of man to be the sole object of civil rule, and of course the only measure of its restraints, we perceive the necessity of allowing men the full exercise of their discretion in the choice of a government and rulers. It is not only that there is no umpire to decide who are the wisest and best, and to select them as their political guides; nor that power begets injustice and folly in the best and wisest bosoms; that men are induced, at last, to refer to the great mass the selection, not only of the constitution and its administrators, but also the expediency of every change in either, or in both. The people must be regarded, after all, as the best and the only judges of their true interests, and what is promotive of them. If they are not, to whom can the matter be referred? Ignorant, interested, mistaken, capricious and rash, no doubt, they often are; yet in what class of mankind, at once wise and just, shall we hope to find a depository of their interests? What body of men would be always wise enough to rule; and, if wise, unassailable by the lust of power? It is very true, that a body of men in every respect qualified for the salutary exercise of power, may occasionally be invested with it; but who are to be their successors; who shall correct their errors, should they commit any; who shall displace and punish, if any of them should become corrupt? The People.

What is now urged, therefore, in regard to the people, obviously relates to them as the permanent tribunal and

source of all political power; who, though they may often delegate portions of that power, must still remain the ultimate, as they were the primary fountain of all knowledge, and of all authority.

That consent of the people is the only mode of originating and continuing the right of government, is indeed, like other plain propositions, yet more demonstrable from the absurdity of assuming any other principle as its basis, than its own intrinsic reasonableness. If, then, we examine the pretended titles to subsequent dominion, and apply the *reductio ad absurdum vel impossibile* to each, we think it will be found that they are wholly to be rejected as the sources of a legitimate title to political dominion. These supposed grounds of the subsequent right of civil government, are reducible to the following six, viz *possession, inheritance, prescription, ancient consent of the governed, virtues of political rulers, and expediency*; each of which, it has been urged by some writers, is sufficient to legitimate an existing government. We propose to make a few remarks on each, and

1. OF POSSESSION. This at once presents itself to the mind as a very singular ground on which to establish a right. It is true, indeed, that the municipal laws of most countries recognize, under some circumstances, a preference for, or a *primâ facie* right in a possessor; not because he is the possessor merely, but because there is a supposition, in most cases in which possession is respected, that there is no one who can exhibit a better title. Where we find one in actual possession, without any knowledge on our part of the means by which he obtained it, or now retains it, it is a just presumption that the possession and the right are not severed, but that they harmonize in the same individual. This inference is drawn from the admitted existence of a right somewhere, and it then becomes a rule of mere policy, that *melior est conditio possidentis*; and this obtains

until a better title be made out, when the right takes place of that which was tolerated for a time, and the rule of policy yields to the superior claim of him who is out of possession. Possession then, even when favoured by municipal laws for the quieting of controversies, is no more than a temporary presumptive title; it is regarded as a mere evidence of right, and not as the source of it; for whenever there exists a clear right in opposition to such possession, there, as we have seen, the possessory claim is wholly unavailing, except, indeed, in the solitary case of what is called prescription or limitation. In such case, the positive law has defined the time in which the right must be pursued, which, if disregarded by the true owner, clothes the mere possessor with a title which overreaches that of the person out of possession. But, even in this case, it would be more proper to regard it as the conferring on the possessor of a new right, than as the confirmation and enlargement of an old one. This title of limitation or prescription, moreover, is not a right flowing from possession merely, but is a positive estate or property vested by the law of the land, which thus punishes the laches of the former owner. At the same time that these laws stimulate the indolent to a timely vindication of their just rights, they quiet the titles of those in possession, and thus give security, not only to the mere possessor, but to those who have been at all times rightfully possessed. The foregoing views in respect to property are, in part, equally applicable to the mere possession of sovereign power. But independently of what has been thus far stated, we may now remark, first, that it is always unsound to argue from matter of fact to matter of right; nor can any just reasoning or analogy rest on a comparison of mere positive institutions with the general precepts of natural law, since the former may pursue, or vary from the latter, whilst the latter cannot be made to yield in its provisions to the enactments or

policy of human laws. And, secondly, we may remark, that if the right of civil government did not originate in possession, it cannot be continued by possession, because it may be laid down as an axiom in morals, no less than in physicks, that a consecutive series of inefficient causes can never produce a positive result. If the original taking of possession does not confer a right, it is not conceivable that the continuance of that possession can add any thing to that right. For if I have supported myself in the unjust occupation of my neighbour's habitation for a year, the injury is so far from being lessened by length of time, that it is in fact only aggravated. Such a foundation of right involves the paradox, that the longer an injury is continued, the less right has the injured person to complain, and the more innocent does the wrongdoer become; and yet such, in reality, would be the effect of placing the subsequent right of government on mere possession. In conclusion of this topick we will only remark, that possession, as a source of any right, is still less tenable on the principles of natural law, than on those of civil society. It is said, indeed, that occupancy is the mode of acquiring property in a state of nature; yet even this, when correctly understood, will be found to rest solely on consent, express or implied, as has been shown in a preceding lecture. Occupancy shows the intent of men to appropriate specific things, and is the date of their exercise of a right; but it is evident enough that occupancy *per se* is not the foundation and actual source of the right. This may be exemplified by supposing men to appropriate by occupancy certain things, as, for instance, the ocean, wherein property is wholly unnecessary for the purposes of life and convenience. In such a case we know that occupancy would confer no right whatever, because the consent of mankind could never be presumed to an appropriation of that sort. We have dwelt perhaps unnecessarily long on this point, as, without argu-

ment, there can be no hesitation in rejecting possession as a source of the subsequent right of government.

2. OF INHERITANCE. What has been stated of a continued possession of the powers of civil government, applies in a considerable degree to inheritance, or hereditary succession. A man can transmit to his heirs only what belongs to himself; and he leaves his rights subject to all the limitations and defects which they had while they appertained to himself. If a false or defective right was liable to be defeated in regard to the possessor, there can be no reason why it shall gain strength in the hands of his posterity, who, independently of positive law, are always considered as *pars antecessoris*, and, as such, clothed with no greater rights than he. Hence the legal maxim, founded on the nature and reason of things, '*quod derivativa potestas non potest esse major primitivâ.*' There is no question, then, that in the mere transmission there can be no quality which fortifies a weak claim, or justifies a bad one. Whatever was the infirmity in the ancestor's title, descends with it, and is visited on the heir. Even if the title of the possessor be a valid one, its vesting in his posterity depends altogether on the nature of the right itself. Some rights are merely personal; others are alienable *inter vivos*. Some are, by the common consent, not only allowed to be transmissible by a formal declaration, called a will, but, in the absence of such a declaration, vest in the heir of their late possessor. All this, however, depends wholly on the consent of the community, either expressed or implied. The right to make a will, and the succession *ab intestato*, even of things in which we have absolute property, and may alienate during life, are not necessarily consequent on such absolute property, and such right of alienation. If this be the case in regard to corporeal things of our own acquisition, and which, to use the language of the Civilians, are *in patrimonio*, it is manifestly absurd to treat sovereign power, or the right of

civil government, as hereditary property. A sound administration of government and law demands experience, knowledge and integrity; and these, unfortunately, are merely personal, and consequently are wholly incapable of hereditary transmission. To confer the right then, without its essential concomitants, would be obviously unreasonable. The mischiefs which would be apt to result from dealing with sovereignty as hereditary property, may indeed be countervailed in a degree, as they are in many countries, particularly in England, by the virtual government of ministers, in some sense elective, or controllable by the voice of the people; or they may be allowed by the consent of the same people, to avoid greater mischiefs from competitions for royalty. But this furnishes no argument in favour of the hereditary transmission of the right to govern; for all this is based on consent, and does not come up to the point of inquiry, which is merely, whether the posterity of a sovereign has any right whatever in consequence and virtue of the powers formerly exercised by such sovereign. If the progenitor possessed it not, his heir can have no better title; and if the ancestor were a lawful ruler, and his heir competent and virtuous, still his claim to the exercise of sovereign power would not be superior to that of others, unless it were conferred on him by the consent of the governed. Inheritance *per se* may, therefore, be wholly rejected as a source of the subsequent right of civil government.

3. OF PRESCRIPTION. The next plea on which the right to supreme political power has been supposed to rest, is that of long continued inheritance, or succession; that is, of custom, more frequently called prescription. A prescriptive right to command, and the correlative prescriptive duty to obey, is a doctrine which sounds very strange to republican ears. Its novelty, however, should be no objection with us to its correctness. If it can pass the

ordeal of just examination, it is entitled to be respected, though it be wholly unknown to the political jurisprudence of this, and all other republican countries. We are to inquire, then, whether sovereign power can, in its nature, be liable to the rules of prescription. If we advert to the definition given of prescription by Grotius, Puffendorf, Rutherford and others, we shall find that no part of it can be made to embrace sovereign power, unless, perhaps, it be conceded that the entire and absolute power was in fact in those who exercised political rule, without any ultimate *scintilla juris* in the people; and even with that admission, we should find no difficulty in showing the inapplicableness of prescription to such a right as that to political power. Prescription has been defined to be that right which may arise from long, honest and uninterrupted possession, though, before such possession, some other person or persons, and not the possessor, had the ownership. The doctrine of prescription rests altogether on the presumed dereliction of the former owner. Now, if prescriptive sovereignty means any thing, it will not only legitimate the title of the successors of a lawful sovereign, but also confirm the claim of those now in power, even against the consent of the governed, be they ever so vicious and incompetent to govern. If the long, honest and uninterrupted exercise of political rule is of itself sufficient to confer a perpetual title, without regard to the merits of the present incumbent, it can be on no other ground than that sovereignty, like property, if once alienated, can never revert. But the exercise of all political power is for the happiness and protection of the governed. It differs, in its very essence, from property; it is not, in its nature, alienable for ever, but only so long as the alienee is fully qualified to rule; and there can be no tribunal to judge of that qualification, but that of the majority of the people. A prescriptive right of sovereignty implies that it originated

honestly, that is, with the consent of the governed; and that from the long and uninterrupted exercise of it, those who are at present in power, are equally in by consent: but this latter presumption endures only until the people have judged, that he who is now in power, is not competent to rule them. When that opinion is manifested, all presumed consent must vanish. If the political power originated in wrong, the doctrine of prescription does not apply. If it originated in right or consent, it is continued by implied consent, which, in truth, is not a prescriptive title at all. But the friends of this prescriptive right are not content with this; they go further, and contend that an honest title becomes a perpetual one, simply by long and uninterrupted use. But they must at least admit that mere length of time, and uninterruptedness of possession can raise no presumption in favour of its continuance, unless there be both knowledge and liberty in the governed, whereby they might have efficiently dissented; for if their silence were the result either of ignorance or fear, no inference favourable to its continuance can be made. But allowing to the advocates of this prescriptive right, that it originated honestly, and was continued by the voluntary consent of the governed, through a succession of ages; and admitting further, that the present possessor is fully qualified to govern, can these facts confer on him a title to political rule, after the governed have manifested a desire to change their ruler, or the form of their government? We apprehend not, because the long, and uninterrupted continuance of political power can have no other effect than to raise the presumption of a full consent to all that has passed; but it cannot be considered as an alienation of political power for the future, because it is not of the nature of political power to be granted or alienated absolutely, in reference to the future. On the whole, therefore, it may be laid down, that prescription, like possession and inheritance, is at most but

evidence of the right of civil government, and can never be the source of that right.

4. OF ANCIENT CONSENT OF THE GOVERNED. This is another pretended foundation of the subsequent right of civil government, and appears to us equally untenable with those we have already examined. To compare the right of a sovereign to impose obligations on his countrymen and posterity, to the recognized right of an individual to charge and burthen as he pleases, the property which he transmits to his descendants, appears to us extremely absurd, were it on this ground only, that the property which we transmit is our own, while the personal and political liberty of our countrymen is entirely theirs, and cannot be touched or affected, in right, by any act of ours. If my progenitor, immediate or remote, is incompetent to bind by his acts my personal and political rights, though he may fetter the transmission of his property as he pleases, it seems to follow that any number of men, or, in other words, any prior generation, is equally incompetent to bind a succeeding one. The ancient consent of the governed can no more be construed to extend its obligatory force to the present, or to future generations, than the present consent of an individual to remain in servitude or in poverty, can bind his posterity to remain forever in the like condition. Nor is the case at all varied by the fact, that a positive and great benefit was conferred on the governed by the political rule to which they consented. The benefit conferred, and the power gained, are reciprocal, and merely personal. A contrary doctrine would be pregnant with every mischief; it would be making one set of people judges of the rights and condition of another; and, still more, it would be establishing a fixed rule in regard to a subject variable in its very nature. For the greater part of governments, taking their rise in the infancy of societies and states, are adapted only to that infancy, and necessarily require pro-

gressive alterations, perhaps not merely in the smaller matters of the law, but also in the fundamental principles of the government. Allowing, therefore, the original framers of a government to have done the best for the occasion, which in truth has but seldom been the case, yet if the right in question be allowed, they would have left only a curse to succeeding generations. Who would be thankful to his progenitors for their wardrobe, however ample, and adapted to us at the time, if he were to receive it under the condition to wear it in all the different extremes of seasons, and amidst all the variety of successive modes?

5. VIRTUES OF POLITICAL RULERS. The claim to political rule, based on the virtues of those who *de facto* have the charge of government, also appears to us wholly untenable, although it was a very favourite doctrine with the political philosophers of ancient times. However conspicuous and useful these virtues may be, they certainly, of themselves, can impart no such authority, unless they be thus respected by those over whom jurisdiction is claimed. For it may well be asked, who shall sit in judgment on these virtues, and declare their existence and operation? If those who claim their possession, should in fact be superior to those who are at present in power, who shall pass on the conflicting claims, or make a selection among persons equally competent? If, on the other hand, those who are in power are more virtuous and wise than all others, how is the fact to be ascertained but by the ultimate decision of the people; and when thus ascertained, does it lead to any thing beyond the expediency of continuing them in the exercise of the political rule? If the political rulers be more wise and virtuous than any who are not in power, and they be not the sole judges, but the people are to decide, and even do decide that they are pre-eminent in every qualification; Plato and Aristotle, indeed, may hold them to be kings *de facto* and *de jure*, but the political philo-

sophy of more modern times, and especially of our own day, must smile at the strange conceit, and demand some further recognition of their political authority, before the people can be bound by an allegiance to them. To deny to the people this right, is virtually to deny them the pursuit and security of their own happiness; and to transfer to their governors an unalterable right to sovereignty, because they had wisely and virtuously administered the government, and might continue so to do, would be very like giving to your agent the whole of your valuable possessions, in consideration of his skilful and honest management of them. The knowledge and virtues of rulers may, indeed, often render it highly expedient that they should be continued in power; but the right of judging of this expediency can reside no where but in the majority of the people; and this amounts to a full rejection of the doctrine, that the virtues of political rulers can be relied on as a foundation of the right of civil government.

Were we, indeed, to argue from matter of fact to matter of right, it must be admitted that history furnishes us with many striking examples of such respect to wisdom and virtue, as would sanction the idea that they of themselves conferred the right of political power. Where the people have been free to act, though ever so rude and savage, they have very generally selected for their rulers, those who were distinguished for age and experience. The kings, governors and magistrates selected by the people in the infancy of society, were generally venerable for their age, and admired for their wisdom, knowledge, and long experience. The very names or titles usually conferred by ancient nations on their rulers, indicate their great respect for age, and the virtues of the heart and mind. *Alderman, senator, elder, father, ancient, king*, are all words expressive of age or knowledge. The title also of *זקן*, *Rash*, among the Hebrews, of *Sheikh* among the Arabians, and *Reix* among the

Scythians, are of like import. Camden derives our word king from the Saxon *Cyning*, or from the words *can* and *ken*, the former signifying power, and the latter, knowledge, both of which kings ought, and, in the simplicity of primitive times, were presumed to possess.

6. OF EXPEDIENCY. The last of these supposed foundations of the right of civil government, on which we have to remark, is Expediency. In descanting on this principle, as it has been applied to the original right of civil government, we have already considered some of the objections to which it is justly liable. What remains to be said in regard to its operation in sustaining the subsequent right, will be consequently more limited.

That expediency, utility, durable happiness, or whatever other name we choose to call it, is the only ground and measure of human obligation, is a doctrine that has been ably defended by many eminent writers, as Paley, Hume, Bentham and others, though it has been warmly impeached by Mr Gisborne, and, in the opinion of Macaulay, entirely overturned by him. We cannot pretend, within the narrow limits to which we are necessarily circumscribed, to enter fully into so extensive and celebrated a question. Though we differ from Paley and others, in attributing the right of government in any case to expediency, yet we would refer it secondarily to expediency, and primarily to consent; or, in other words, we think the expediency itself must be ascertained by the general consent, or by that of a majority of the people. It is sufficient for our purpose to assume expediency as the reason of the institution of civil government, and the measure of its laws, its constitutions, and its various modifications; and, in the sense which we have just intimated, we think it will be found to steer clear of the objections to which the theories on either side have been supposed to be liable.

If it were expedient originally to introduce government, or any particular form of polity, it might be expedient subsequently to modify and accommodate it to various exigencies; and we conceive that neither of these expedencies can be ascertained but by the consent of the governed. Expediency may justify, and almost force that assent; but no political rule, we think, can justly exist until the governed have pronounced on the expediency, or, what is the same in effect, have given their implied consent by wilful silence, they having full knowledge, and perfect liberty. Thus we may reach the same conclusion as others, though by a different track. While expediency must be the law to each man's conscience, there is no human tribunal to enforce the law. Neither those who like himself require to be ruled, nor those whom nature hath ever so eminently fitted to rule, can enforce his consent to any form of government on the score of expediency. This motive, indeed, should guide his consent, and, if he wilfully acts contrary to it, will mete out exactly the measure of his guilt to the great governor of the world; but as respects his fellow beings, his assent is not only the date, but the source of right, and on this assent, express or implied, must the right of dominion solely depend. We have shown that a man's assent to actions, cannot alter their quality; and while we contend that consent must exist to justify a government, we do not see the absurdity of Dr Paley's expediency, as a principle to regulate that consent. That author, indeed, makes it the ground of the subjects' obligation. It is, without doubt, the motive which every good and wise man must have in view, and must propose to himself when he yields his assent to any measure, whether private or publick. Still, expediency *per se* cannot confer the right, but must be followed by consent, before the expediency is ascertained or defined. And this expediency, also, must not be mistaken for what appears to be such to

every narrow mind, and untutored understanding. The rules of general utility, or expediency, are, after all, the rules of morals, when applied to private affairs, and of politicks, when they are applied to publick concerns. They are the general rules deduced from large views of human life and affairs, and are no more to be left to the invention or the interpretation of vulgar minds, than the principles of physicks are to be established by them. Expediency soon taught rules suitable to infant communities; and the principles of truth are so consistent with themselves, that they naturally expanded, and accommodated themselves to the extension and complication of society. Morals may perhaps be compared to opticks: their original principles are few and simple; and he who has measured a few angles of the rays of light, comprehends with facility the phenomena which lead the ignorant observer into a thousand false notions as to their causes, though experience keeps him from practical mistakes regarding them in daily life. This expediency, we repeat, is no vulgar, every-day convenience, adapted to a present particular exigency; but is founded on general views; is embodied in general rules, to be found in the books of ethicks and politicks; has been practised by legislators; and is every where taught by wisdom, and embellished by genius; animates an Aristotle, and sparkles even in the system of a Lucretius.

The very justice of referring the original right of civil government to consent, is the dictate of this expediency. For if God had determined we should be happy at all events, and with this view had imposed civil society and political government upon us at our very creation, it would have been tantamount to depriving us of free agency, not only in this, but in other matters. Divine wisdom, however, has acted towards man in this matter as in other objects of good presented to his choice; it has given to man a liberty or power of choosing, and, of course, of consenting

or dissenting; while, at the same time, it has proposed motives for determining that choice. And in deciding on this question from these motives, we should not fail to remember, that if we consider expediency as any thing more than a guide for our consent, we should necessarily be obliged to have ascertained, before we did any one act, whether it were actually expedient, and correspondent with the design of God in the government of the world; whereas, according to what has been already urged, it is sufficient for others that our consent has been obtained; and for our own consciences, that we have consented on grounds which the common sense of mankind conceives to be just.

Dr Paley's doctrine, that 'every man must judge for himself concerning the general expediency of publick measures,' has been objected to by Gisborne, Macaulay and others. But their objections seem equally applicable to their own theory of consent. The objections to which we allude, are the confusion and anarchy which would be introduced by the variety and inconsistency of men's opinions, and the inconvenience of preferring these to the voice, will and consent of the community. But, in reality, what advantage in these particulars has the principle of consent over that of expediency? It is obvious to the least reflection, that consent, however arbitrarily it may be supposed to bind others, must proceed in every man's mind on some reason or motive, and the question is as to this motive. Whether that motive be the good of the community in particular, or decorum, or virtue, (allowing them, for the sake of argument, to be essentially different,) is it not apparent that there is in men's minds as much contrariety of opinion as to the character of these, as there can be imagined to exist respecting expediency? Is not every man as likely to differ from his neighbour as to what things fall under the denomination of particular good, decorum, virtue &c. as he is on questions of general utility or expe-

diency; and must not his consent therefore, (while it is as completely within his own power, as is his opinion as to what is expedient,) be quite as likely to be given for the common weal? We can, for our part, discover no manner of difference. What has induced men, in violent and corrupt times, to pull down an ancient establishment, and erect a new constitution, and appoint new functionaries? Generally, no doubt, the wish of the nation; or, in other words, its strongly expressed consent. But what caused this wish, this consent, but the vexations of the old system, on the one hand, and the advantages hoped for in the new, on the other? considerations which made the expediency obvious, at least to a majority of the thinking part of the community. Individuals, then, must judge, and give their consent as to questions of expediency; but whilst this is the case, no wise and virtuous man will see it expedient to assist in any change, unless a clear majority deem it equally so; or, if you please, until he is assured of the consent of a clear majority. In truth, it is apparent, on weighing the different foundations which have been assigned to the right of civil government, whether original or subsequent, that they all proceed on, and have at least a remote reference to, the notion of expediency, or consent, or both.

If we again cursorily advert to the foregoing six grounds on which political power has been supposed to rest, we shall not fail to find this the case. Possession and inheritance have gained something like the character of a right, partly from the consent which is to be presumed from them, and partly from the inconveniences which have generally been found to result from a hasty change, and rapid succession of governors. So, also, prescription is indebted for the force attributed to it, to the same principle, viz. dereliction, or implied consent. The resort to the ancient consent of the governed, amounts almost to an admission of the principle we contend for, not only because

if one generation has the privilege to consent, another can hardly be denied it, but because by resembling these obligations on posterity, to the charges which men sometimes make on the inheritances which they leave to their heirs, the similarity of this contract to others is admitted; which is enough, as we before stated, to draw after it the principle we have been advocating. So, also, the virtues of political rulers, when appealed to for the same purpose, is a principle clearly proceeding on the idea of their serviceableness to the governed, and this, again, is nothing but another name for expediency; and that expediency is presumed to be ascertained by consent, because it is believed that men will consent only to what they find expedient. So, on the other hand, consent may be said to imply expediency, because the experience of the expediency must be supposed to have preceded and elicited the consent.

We should not have dwelt thus long and pertinaciously on these topics, had not these various theories, groundless as they are, assumed an importance from the lustre of the names with which they are connected, and had not bad men and designing politicians attempted to justify acts in political rulers, which the laws of God, and sound morals unite in condemning in others. From this source arose the preposterous distinction which politicians are sometimes bold enough to make, between moral and political virtue, and which is a monster generated by sophistry, fostered by state policy, used by wicked ambition, and upheld by slavery, and vulgar prejudice. In an enlightened and virtuous community this distinction can find but few supporters; it is, however, a mischievous and dangerous doctrine in the hands even of a few; and the people of no country are so virtuous and wise as not to be sometimes misled by doctrines the most unsound. It is true that divine wisdom hath implanted a powerful conviction in

men's minds, of their right to happiness; so that most of the artifices by which they have been occasionally deluded into an abandonment of the bulwarks of their felicity, have been ultimately detected. The truth is, that governments have so often resulted from chance; have so frequently grown up by successive and distinct accidents; been added to by subtle ambition; and variously modified by change of times and tempers; that it is no matter of surprise that their original principles of construction should have been at times forgotten, and their objects and advantages lost sight of. Princes, long accustomed to rule, at length imagined that both the country, and those whom they governed, were their patrimony; and from the long abuse of power, conceived that they could do no wrong, as, what is still more strange, the people, long subdued to submission, almost forgot they were not designed to be slaves.

When we speak of the original principles of government, we mean such as are strictly so; that is, such as are fundamental, and which ought to be the basis of all governments: not of such views as sometimes actuate the heads of two contracting parties, the one consenting to be ruled, the other to rule, on certain principles. For it is sufficiently obvious how political societies grew up, and that the spectacle was not unfrequent, of a whole community of men basely submitting themselves to unrestricted servitude. Indeed, if we were to be bound by the political compacts, as by the bonds of our ancestors, it is pretty plain that there is some time in the history of most nations, from which tyranny might date the existence of a compact between subjects and rulers, whose observance would perpetuate the most lawless oppression. As to the original formation of societies, we know them to have been too limited in their nature and occasions, to provide for the numerous exigencies, and essential changes of con-

dition, which would occur in their political progress; so that the just limits of the reciprocal duties of rulers and subjects, could not be defined. But if we refer even to the families of patriarchs and shepherd kings, (those first faint images of states) we shall find in them the principles which we contend are the only ones on which government of any kind can be justly founded. It is not to be supposed that the natural affection of fathers, during these patriarchal ages, imposed any other than salutary restraints on those whom they ruled, or any more than were requisite for restraining either the sallies of youthful passion yet unsubdued, or correcting the errors of reason yet undisciplined. There is no other foundation for parental power; and when, on the parents' decease, the government of the family descended to the elder sons and branches of the family in succession, they could administer the sacred trust only with the view of counsel and protection to those whom they regarded as equally entitled to happiness as themselves, and who were free, had they so chosen, to seek for counsel and protection at other hands. So that whether we seek the foundation of the right of government in general principles, or trace it in the ancient *nuclei* of societies, we are conducted to the same conclusion, viz. that government is the creature of communities for their good order, melioration, defence and happiness; and that the people are the sole judges of what is convenient and conducive thereto.

But if in all of the foregoing theories even an implied consent is excluded, and their respective advocates refer the right of civil government to mere possession, inheritance, prescription, ancient consent, virtues of rulers, or, lastly, expediency, we can agree with none of them: for I may possess another's property, and it gives me no manner of title; I may leave to my heir estates, but they cannot enjoy them unless I had been rightfully possessed; I may

hold the estate of another during any period, and no prescription can *per se* legitimate my title. So, also, I may hold these estates with the consent of the owner, but my right to hold terminates the moment he withdraws his consent. I may make better use of these estates, and may administer them more skilfully and virtuously than would the owner, and yet these circumstances could not add one particle of right to my claim to retain them; and, lastly, I may be so circumstanced in regard to these estates, that it would be highly expedient for the owner to permit me to remain in possession; but no one could imagine that this would confer on me a right to withhold them against the wishes of the owner. Whence then, in all these cases, can any right proceed, but from the consent of the true owner. This, we conceive, is the precise case with civil or political power. It originates in consent, and is continued by consent; and any other notion of government is abhorrent to common sense, and sound reason; whilst the administration of it on any other principle will sooner or later involve it in destruction. Philosophy itself, alarmed at the idea of subverting existing institutions, and of appealing to the consent of injured and uninstructed communities, has sought indeed sometimes, with an excusable prejudice, for other props to the political system: but she may remember on the one hand, that in extreme cases the people have never been long deluded by this sophistry; and, on the other, that the increasing melioration of mankind renders such an appeal every age less alarming.

LECTURE VI.

OF THE EFFECTS OF SOCIETY AND GOVERNMENT ON THE NATURAL RIGHTS OF MAN.

(1.) Jurisdiction and Law the necessary result of the change from a state of nature to that of civil union.

THE act of associating himself with a civil society, produces a material alteration in the rights of an individual. At liberty before that act, to assert his rights, and to redress his wrongs, without consulting any mind, or using any force but his own, he binds himself by the union to take the general will of the community as the guide of his; and while he gains the advantage of having on his side a prevailing force, to aid him in the assertion of his civil rights, he is, on the other hand, obliged to renounce all resort to his own. In all matters, therefore, in which the publick have any concern, the individual particularly interested is obliged to submit to the common understanding, which resides in the legislature and the judiciary; and to the common force, which is wielded by the executive.

The standard, moreover, whereby the quality of his actions is to be estimated, is considerably altered: for it can no longer be his individual good, nor even the general good of mankind, that is to define his rights, since many things, innocent as they affect individuals, or the general society of man, may assume a contrary character when considered in reference to the particular community of which he is a

member. Hence it follows, that instead of consulting his own felicity, with regard at the same time to the general good of mankind, a member of a civil society may more properly be said to consult his happiness with regard to the peace and order of that society to which he is attached.

The difference thus caused in the rights of man, may be described as immediate and mediate; that is, it arises either from civil union itself, or from the civil laws which are instituted after the union.

Some rights are affected by the immediate operation of the civil compact or union itself: such, for example, are those which arise from an injury, either before or after it is committed; viz. the defence of one's self at discretion, and the pursuit of reparation for a damage sustained. Both of these rights are, by the very act of union, considerably modified; and sometimes, under certain circumstances, are wholly taken from the individual, and vested in such functionaries as the publick have constituted for the express purpose of ascertaining and enforcing such rights.

Other rights, untouched by the mere act of civil union, are nevertheless understood to be subject to such restrictions as the common will of the society may afterwards, from time to time, impose on them. The relinquishment of the right of avenging our own wrongs, is necessarily immediate, by the very nature and object of government, or rather of the agreement to be governed: but after political union, those rights which are not affected by the mere act of union, remain in full force until the society either modifies or abolishes them. Thus, to give an example of the second species of rights, there is no reason why a man should not be permitted to vend the products of his labour at any market he pleases. Every citizen, therefore, exports and imports what he pleases, until the laws partially or wholly forbid the one or the other.

Again; before this union, men have a right to contract marriage in any form they please: the act of political union leaves this right unimpaired, and we may enter into this contract in any mode we see fit, until the society expressly legislates on the subject. From what has been said the student at once perceives that the right to judge of and to vindicate many of our natural rights, is transferred at once to the society of which we become political associates; whereas many other natural, and all our adventitious rights, remain unimpaired until the society expressly or impliedly modifies or annuls them.

Jurisdiction and law of some kind are, as we have stated, the natural consequence of civil union. By jurisdiction we mean the right of a civil society to make laws, to determine matters in dispute between its members, and to compel the parties to submit to such determination. In its largest sense, it means the sovereignty or power residing in a state or nation, by which it is enabled rightfully to legislate, and to determine in reference to all matters which concern the territory or soil, to all moveables therein, and to the conduct of all persons who reside within its limits, whether as citizens or strangers, and, finally, in regard to the claim of all others, be they nations or individuals, who assert a right over the country, or any part thereof, or over the persons or moveables therein. This extensive power, with which every independent nation is clothed, is usually partitioned out by the collective body, and exercised by their three great functionaries, the legislative, judicial and executive branches of the government. But however this power may in fact be exercised, it will be found that there is no conceivable jurisdiction which may not be referred to one or more of the three following heads; first, jurisdiction *in locum*, or that which is strictly territorial, being not only confined within certain local boundaries, but flowing solely from the relation subsisting between the commu-

nity and the place over which the power is claimed. Thus, every state or nation has jurisdiction *in locum* within its territorial limits. The state of Maryland has this species of jurisdiction within her own limits. The United States have it within the District of Columbia, and also within their forts, arsenals &c.; but the other jurisdiction exercised by the Union is not strictly *in locum*, though it be restricted within the limits of the United States, but flows from other sources, as we shall have occasion to notice hereafter.

Secondly. Jurisdiction *in personam*, by which is meant, not merely the power to compel persons to submit themselves to the law, (for in this view all jurisdiction may be regarded as ultimately *in personam*,) but that jurisdiction which flows from, and is exercised in respect of some special personal privileges claimed by those over whom it is to be exercised, and which privileges exempt such persons from the ordinary judicatories of the country. Thus, for example, the peers of England claim to be judged by their peers. So, also, both in England and on the continent, the pious fervour of a former age bestowed on all ecclesiastics an exemption of their persons and property from the control of the ordinary tribunals of the country; and the emperor Theodosius extended this privilege to all persons attached to his private domain, whether freeman, freedman or villain, and ordered that in all matters, civil and criminal, in which they were concerned, a special jurisdiction should be constituted, entirely independent of the ordinary judges. The emperor Constantine granted various immunities to the veterans, and, among the rest, that they and their sons should be privileged to sue and be sued before the Prætorian Præfect, and be in no way amenable to the inferior judges. So, likewise, the emperor Leo ordained that all commanders of the fortresses, and the generals and officers of the frontier

militia, should be subject to no other jurisdiction than that of a certain dignitary of his imperial household. In like manner, to come to our own time and country, the president, vice-president, and all civil officers of the United States, can be removed only by impeachment before the senate; and ambassadors and consuls have, under our constitution, the privilege of being amenable only to the federal courts. In all these, and numerous other instances easily cited, the jurisdiction is said to be *in personam*.

But this expression, 'jurisdiction *in personam*,' has also a distinct, and a more popular acceptance, in which sense it is contrasted with the antagonist expression, 'jurisdiction *in rem*.' By the former is simply meant, that the actor or plaintiff is only entitled to call on the *reus* or defendant to respond personally, in damages; and by the latter, that the claim set up can be enforced against, and satisfied out of property attached within the jurisdictional limits of a particular tribunal. Thus, for example, a court of admiralty will proceed *in personam* to vindicate a mere personal claim, arising either *ex contractu*, or *ex delicto*: but if there be any charge or lien on the defendant's property, or if he cannot be found within the territory, but his property is there, the court then proceeds *in rem*, that is, against his property, as a means of compelling him to respond to judicature. This distinction, however, regards rather the process of the tribunal, than its jurisdiction, for all proceedings *in rem* may be considered as means to compel the judicial appearance of the defendant; and though process *in personam*, and *in rem*, often issue in the same cause, it is competent for the defendant to remove the attachment from the specific property, by otherwise effectually securing to the actor the benefit of his claim, in the event of its being established.

Thirdly. Jurisdiction *in subjectam materiam*. This flows from the peculiar nature of the subject matter in controversy, and is often referred to the compound consideration of locality, person, and the nature of the *gravamen* itself. Hence we find judicial power divided into various classes; and tribunals are constituted to adjudicate on matters referrible only to one or more of these classes. In such case, the court is said to have jurisdiction *in subjectam materiam*. Under this view, the cardinal division of jurisdiction is into civil and criminal; but there are also many subordinate divisions; thus, we have natural, maritime, military, ecclesiastical, equitable, fiscal, and common law jurisdictions, and many others still more limited.

So, likewise, courts may possess a general jurisdiction *in subjectam materiam*, but a limited or personal one as to the parties litigant; in which case, however, it would be better to speak of the jurisdiction as *in personam*, since the chief object of this three-fold division of jurisdiction is to give a distinctive name to each, as it flows mainly from place, personal privilege, or the nature of the controversy. Hence, though a general jurisdiction may be exercised *in locum*, *in personam*, *in subjectam materiam*, yet each should take its appropriate name, as it is characterized by one or the other of the three enumerated sources of jurisdiction. So, again; though there are distinct systems or codes of law usually applied to the various classes into which this last species of jurisdiction is divided, yet the character and limits of each division are ascertained rather by the nature of the controversy than by the code of laws by which a particular tribunal may profess to be mainly directed. So, also, in the exercise of all jurisdiction, controversies are often affected by different systems of law, varying according to circumstance: hence it is that the student will often hear the expressions '*lex fori*;' '*lex loci*'

contractus; 'lex loci rei actæ;' 'lex loci rei sitæ,' &c. which simply mean that the cause in judicature must be governed, according to circumstances, by the law of the tribunal appealed to, or of the country where the contract was made, or of that in which it is to be performed, or of that where the *res subjecta* is found. These topicks are only briefly alluded to at this time, as coming within the scope of my general design, which is to shadow forth the elements and leading doctrines of the entire system of jurisprudence. But to proceed.

The student will find that jurisdiction has been generally divided by the writers on natural and political law, into two kinds, viz. that over persons, and that over things, though the first may very properly include the latter; for though the right to a thing be involved, still the controversy touching the right, is between persons. This distinction of jurisdiction into two sorts is made in reference to the sources whence society and government derive the right to decide; for, as has been already stated, one case in which persons are obliged to abide by the determination of a community is, that the thing about which the controversy arises, as, for example, land, is under the control of that community, though the parties litigant, or one of them, may be members of a different community. In this case, then, it is manifest that the jurisdiction which is claimed flows solely from the control which the community has over the *res subjecta*. So, likewise, jurisdiction may arise over persons, either because they are members of the community, or because they are temporarily in the country, in which latter case they owe a temporary allegiance, and are bound to submit to its laws, and to the jurisdiction of its courts. All jurisdiction however, as is well observed by Grotius, is, in one sense, over persons, since it consists in a right to determine controversies between two or more persons, and ultimately to compel them to submit

to the determination, be it to do or forbear an act, or to receive or abandon a thing. Thus, for example, if A attaches the goods of B, his absent debtor, or brings ejectment against land claimed by B, who is not a citizen, nor resident within the community, and judgment, with execution, is had thereon, the jurisdiction which has been exercised arises, it is true, from the fact that the goods or land were within the court's jurisdiction; but still, as respects the operation of that jurisdiction, it is also personal; for it compels B, in the first instance, to appear and defend his interests, or to be for ever bound by the decree or judgment which is past; and the property is thereby fully vested in A, the plaintiff. The foundation of all civil subjection, or jurisdiction over persons, is laid, either immediately or remotely, in such a civil union as places such persons under the control and protection of the society. We shall have occasion presently to consider the nature of this power over persons; and even now it must appear to the student sufficiently intelligible as to its origin and general objects. But the jurisdiction claimed by governments over things, when this exercise of power is to affect the rights of those who are not members of that community, is not quite so obvious. We shall therefore, at this time, advert to the origin and nature of this species of jurisdiction, and then recall your attention to that over persons, with its various restrictions or limitations.

When a number of individuals have united themselves into a community, and have settled on a tract of land, as, for example, an island, or an uninhabited country, which they take possession of, and claim by some natural or other boundaries; such a people found their title in what is called *Occupancy in gross*, which means that the right of property has been vested in the whole body or community of men, and that no individual has any property, or exclusive right. The effect, then, of general occupancy being to vest in the

collective body a full property, it is thereby enabled to exclude all other nations and individuals from any participation in this property, in the same manner as particular occupancy, on the other hand, vests a similar right in an individual to exclude all others from interfering with the particular parcel of land thus appropriated to himself. This right of general property in a community has been denominated sovereignty or jurisdiction, in order to distinguish it from the private right which the separate members have in their respective shares, which is strictly called property. Occupancy in gross acquires to the society, in the very first instance, a general property; but after the society has permitted individuals to appropriate to themselves particular parcels, either by occupancy, (which is founded on the tacit or implied consent of the community,) or by the express grant of that community, the society then ceases to have property in such appropriated lands, but retains over the whole, and their owners, a general or publick right, called, as we have said, jurisdiction or sovereignty; and the country over which it is exercised is denominated its territory. Two effects arise from this sovereignty. The first, which is immediate and necessary, is that none who are not members of the body which acquired the whole by general occupancy, and now exercises jurisdiction, are capable of having private property in such territory; so that no member of the community can transfer any property in the soil to an alien, nor can an alien inherit it; and both these disabilities remain forever, and under all circumstances, unless the community sees fit to remove them. The second effect to which we allude relates to moveables, and is not the natural or immediate result of occupancy in gross, or of the sovereignty or jurisdiction which remains after the establishment of individual property, but is merely consequential, or rather accidental. The effect we speak of is, that as an alien cannot, in virtue

of the first principle, even enter within the limits of such territory, unless with the consent of the society, it follows that he cannot come thither even to take away moveables, over which the society never had any right of occupancy, or jurisdiction, and which have been expressly relinquished by their owners in favour of such alien. Hence, under the mere *lex naturæ*, an alien can be neither grantee, devisee nor heir, either of land or of goods; not of the former, because its proprietor received it subject to the transcendental control of the community; not of the latter, because the grantee, legatee &c. cannot come into the territory to take them away, though in all other respects he may have a right in them. With regard to moveables therefore, if the laws of the country did not prohibit it, the grantor or his executor &c. might *transmit* them to the alien claimant, and no principle of natural jurisprudence would interfere with the exercise of such a power. The civil laws, however, of most communities have variously legislated on this subject, as also in regard to landed or immoveable estates; some of them taking away the natural law impediment altogether, in regard to both land and goods; whilst others have wholly inhibited aliens from enjoying either, and have even forbidden the representatives of deceased persons from transmitting to alien claimants goods bequeathed to them, or which they claim in virtue of relationship.

The laws as well as usages of most ancient and modern nations gave to the national fisc all the moveables belonging to foreigners who died within their dominions, leaving no native heirs. This barbarous custom of confiscating such property to the state, in exclusion of the moral claim of the relations of such strangers, obtained among the Greeks and Romans, and was much practised in modern Europe until very lately. So inveterate has been this custom, particularly in France from its earliest history,

that although it was abolished in that country in 1791, by the constituent assembly, yet when the laws came to be revised and digested under the late emperor, the *Droit D'Aubaine* was revived; and it has been retained ever since, with the sole exception that this *droit* of the crown shall not be enforced wherever the subjects of France are secured against it by treaty in that country to which the deceased alien belonged; but in the absence of treaty stipulation, an alien is not permitted to bequeath property situate in France, and it vests in the crown absolutely, as in ordinary cases of escheat, *caduca*, or devolution to the exchequer, *propter defectum sanguinis*.

The legality of this *Droit D'Aubaine* has not been denied by civilians and publicists, but it has been very generally guarded against by reciprocal treaties; and, in some instances, aliens have been permitted by treaty to enjoy and transmit even lands to their heirs, whilst, in others, they have this privilege granted to them by the express laws of a country, which extend either to aliens generally; under certain conditions however, or to particular aliens, upon their special application for the privilege.

But to explain the theory of this doctrine a little further. The student, on reflection, will perceive that this territorial jurisdiction in the state or nation is a very distinct thing from a collection or *congeries* of rights in so many individuals; for if I happen to occupy a tract of land in company with other individuals who take tracts in a like manner in my neighbourhood, though they be ever so numerous, there would, in such a case, be nothing to prevent my alienating my portion to whom I pleased. But where a number of associated persons, however few, jointly take possession of vacant lands, this bestows on that collective body a joint and general property; and when the individuals obtain separate portions, the collective body still retains a right in such portions, so far, at least, as to

regulate their transmission; and, in the absence of positive law, the lands would revert to the common stock on the death of the owner, as some contend, but certainly on his death without heirs who are members of the same political community. The collective body parted with their property to individuals on the implied terms of retaining a salutary control; and in explaining the theory of sovereignty and individual property, all jurists have agreed that the right to exclude strangers from participating in the ownership of lands, and even to forbid their entry within the territory for any purpose whatever, is a power essential to the safety and well-being of every community, and must always be regarded as impliedly reserved on the establishment of every political association. The abstract right, then, cannot be questioned; but the only modern nation of which we have any knowledge, that has exercised this right to an extent of nearly total exclusion, is China: her right to do so has never given serious offence; it is based on principles recognized by all nations, at all times, and rests on the theory we have stated, viz. the acquisition of her territory by occupancy in gross, or some other equivalent means, as conquest, if indeed this be a fully recognized means of acquiring a plenary title to territory and jurisdiction. You now perceive how it is, that this collective right in the abstract person of a community implies three species of jurisdiction; first, over things, viz. the lands taken possession of; secondly, over the persons taking possession of specified portions of land; and thirdly, over strangers whilst resident within the territorial limits of a country. You likewise see how jurisdiction, being exercised over land, involves and influences incidentally the claim of strangers, even to moveables on such land.

(2.) Men are not reduced to a state of nature by a dissolution of the government. The jurisdiction or sovereignty of a state may exhibit itself in various forms, and be exercised by various ministers.

One man or many may exert it over the rest, and over the territory which they inhabit. It seems, then, to follow from this circumstance, and from the remarks just made on the nature of jurisdiction, that the change or dissolution of a government does not destroy this sovereignty, and thereby reduce the members of the community to a state of nature. Hence, though the depositary of its jurisdiction may be changed, the power itself resides in the nation at large: the taking of the sovereignty out of the hands of any particular person or persons, and even an utter uncertainty where particularly to place it, can have no other effect than to reduce the community to that situation in which it was before the jurisdiction was placed in special hands. For to the formation of a government two circumstances are requisite; first, that a body of men shall unite to form a political society; and secondly, that they shall have determined in what form it shall be ruled: hence the social compact, and the constitutional compact are two very distinct things. It appears, then, to be obvious that the dissolution of the government, which is the constitutional compact, cannot reduce the members to a state of nature, but merely to a state of social and civil union; in which case the sovereignty has reverted to that abstract entity called the state or nation. When an event of this kind happens therefore, as it did in Rome, on the expulsion of Tarquin; in England, on the decapitation of Charles; in France, when they executed their king, and dissolved the government; and in the United States, when we absolved ourselves from all allegiance to the British throne and nation, and declared ourselves independent: in all these cases, I say, the members of those states were, indeed, no longer subject to the entire code regulating the

political state, or form of government. Still they were not without law, but remained under the general obligations resulting from the nature, ends and necessities of civil society; and likewise subject to all the civil and criminal laws which were not necessarily involved in the downfall of the political state. In every case where such a dissolution occurs, the jurisdiction over the citizens at most results back to the source whence it came, and the collective body may either adopt a new and different constitution, or dissolve even the social compact also. In such a case only would they be reduced to the supposed primeval state of man, and could then emerge from this state of nature only by uniting themselves to other communities, or by forming themselves into a new society, either primary or civil. You perceive, then, not only that a dissolution of the government leaves its members in a state of civil union, but that all the municipal or civil laws of that society remain in full operation, as far as they do not relate to the mere political state, which it was the design of the revolution to change. And though these civil laws may have emanated from a particular form of government, and from a policy somewhat peculiar to such a form, the abolition of that form does not *per se* imply a repeal of those laws. The ultimate sovereignty of all societies must reside in the people. The constitutional compact, or form of government, originated from them, with full powers in certain functionaries to enact, from time to time, such laws as should be deemed expedient. Now, if the people see fit to abolish the constitution, the laws which have been established by that government, having been virtually sanctioned by the people, are not annulled by the mere abolition of the government by which they were expressly enacted. All laws therefore, whether they concern things *mala in se*, or *mala prohibita*, remain in full force, and their violation would be punished

according to such forms and by such functionaries as remained, or by such as should be subsequently provided. A mere declaration by the people, that a monarchy or an aristocracy, for example, should no longer exist, but that all such delegated powers should revert to the people, would neither abolish existing civil laws, nor deprive the judiciary, and various other depositories of power, of their right, nor lessen their duty, to vindicate the laws. If the people indeed, by a proper declaration of their wishes, were expressly to abolish the whole, there can be no question but that the whole political fabrick would be dissolved, and every individual would be placed in a mere state of nature, or, at most, of primary society.

Revolutions, under any system of melioration, are sufficiently pregnant with evils, without those direful consequences which would necessarily result from the doctrine we have impugned. We presume, therefore, that publick policy, and the implied wishes of the people would sanction the opinion, that all revolutions which do not expressly declare by the voice of the people, that all powers, of every kind, should revert to them, and that all laws should be abolished, could have but the effect to revoke those political powers which it appeared to have been the manifest design of the people to abolish, and to leave all other powers and laws in operation, so far as they can consistently operate, after the constitution or political state is annulled. We have dwelt the more on this point because, obvious as it certainly is, it has not been always practically regarded, as the history of revolutions abundantly proves. In revolutionary times, when the passions are excited, there are men, and philosophers too, who boldly maintain that revolution implies a dissolution of all compacts, government and laws; that the people, in their majesty, are once more placed in a state of natural equality; and that all responsibility, except to God, or to the people as in a

state of nature, has terminated. In a country like ours, whose constitution and laws so manifestly originate from the people, and where the relations between that people and their functionaries are so clearly defined, we have little to apprehend from revolutions, should they occur; and still less from such dangerous and disorganizing tenets as have sometimes disgraced revolutions in other countries. It was nevertheless proper that the salutary doctrine of this subject should be clearly inculcated.

(3.) Of the effects of civil union on the right of Personal Security. I now proceed to a consideration of the changes produced by civil union on certain rights of individuals; and first, as concerns the right of Personal Security.

We may remember that, in the state of nature, each man is the defender of his own rights, and the avenger of his own wrongs. This freedom is materially and, we think, immediately restricted by the very act of civil union. We propose to bestow a few thoughts on the origin, foundation and extent of this restriction.

Individuals of a community being precluded from the exercise of their own discretion and their own force in preventing or avenging an injury, and being obliged to apply to the society, or its constituted organ, the magistrate, to exercise its judgment and force, let us see how they lose the first right, on the one hand, and the terms on which they acquire the second, on the other.

By the act of civil union men do not explicitly renounce and transfer their right of defence or redress; for by this compact they only bind themselves to act with the joint force, and to acquiesce in the rules prescribed by the common understanding. Whatever, therefore, may be implied from this compact, there is here no express renunciation and transfer. So, too, though laws may directly take away this right, the inquiry goes further, viz. whether it is not impliedly restrained by the act of civil union, without

the aid of express legislation; and common opinion seems to answer the question in the affirmative. The point itself may at first appear scarce worthy of examination, since a necessarily implied abandonment is quite equivalent to an express one, and, even if not so implied, express legislation would be certain to follow very soon after the social compact. The question, however, has been started, and jurists have esteemed it of sufficient value, not only to be argued, but to take sides on; and it is proper that students should know, not only the settled laws and conceded opinions respecting all legal subjects, but the reasons on which they are based, the conflicts they have had to encounter, and the views, however eccentric, which have been entertained on these subjects, before the true doctrine in regard to them came to be fully settled. For this kind of ample exposition, I must refer the student to his library generally. As to this particular point, however, I shall very briefly examine it.

It may be argued that, although each individual is entitled to the joint force of the community for his defence, it is no reason why he should not also be permitted to exercise his own, as far as it goes; that there is no direct inconsistency between the two; and that his having the one right, does not of itself take away from him the other. It may be further stated, that the question is not solved by reference to the constitutional compact, which follows the first or social compact, even if the former should declare expressly on the subject; for the inquiry simply is, whether the mere act of civil union, (by which can be meant only the social compact) takes from the members of that society all right of self-redress. And in regard to this second act, it is either a civil law or a compact. If it be a civil law, and is silent on the subject, the question still is as to its extent in impliedly excluding private defence; and if it be a compact, the same point occurs, viz. whether

the appointment of magistrates necessarily excludes all private defence and punishment. But besides that the acquisition of a new right to defence by the community, does not seem necessarily to destroy the old one, it may further be contended, that the magistrate is but the delegate of the society, and that the power committed to him would be only co-extensive with that which resides in the collective body; and that if this latter power be not inconsistent with the right of private defence, the authority of the magistrate cannot be. In reply to all this it may be observed, that there is an obvious reason why the society must necessarily interpose to prevent the use of any private force, if that of the community be attainable either before or after an injury. The society has laid itself under an obligation, by the very nature and object of civil union, to protect every individual member of the community; and how it is that because the society is obliged to exert the common force for the safety of each, the individual ability of each to secure himself is thereby restrained, will appear if we examine a little closer into the precise nature and direct object of the civil union. A community is, indeed, stronger than each of its members; but this of itself is no reason why each should not resort to his own strength; it would be a restraint rather in fact than of right. If, therefore, we consider merely separately an individual's right, and the community's obligation, we shall not arrive at the true reason of the necessary abridgment of private defence and redress, as impliedly consequent on the very act of civil union. We think, then, that an individual is understood to part with his right of private defence &c. by the very act of civil union, not merely because this act places him under the protection of the society, but mainly because the society is also under a like engagement to protect all others, and consequently the society cannot make any engagement to

the one, without reference to its obligations to the other: and this duty of the state would be necessarily interfered with, if the right of defence and of punishment were in any degree participated in by the injured individual. The individual's own act, indeed, by which he became a member of the community, made him a party to the state's engagement, and he thereby incurs an obligation to abstain from all defence, revenge or punishment, and to look solely to the state. It is very true that it is immaterial to an individual what engagements the state, apart from himself, might have contracted; but if we find in that very compact which binds the state to him, an engagement on his own part, in the society's compact with others, it furnishes a solution to the question; and that this is the case cannot be questioned. The act of civil union clearly implies that each individual takes from the society, in return for what he gives it, only what the society has it in its power to grant. He consents to take the publick protection with the limitation springing from the society's obligation to others; and as that obligation is, to guard the rights of all from the possibility of invasion by any, he, as a member of that society, is a party bound, and therefore cannot be a judge in his own cause.

Such being the origin of civil jurisdiction, and the true reason of vesting in the state alone the right and duty of protecting our personal security, our next inquiry is whether, and under what circumstances, this jurisdiction ever ceases, either in fact or in right, so as to place an individual, *pro hac vice*, in a state of nature. Jurisdiction is said to cease in fact, whenever the threatened injury is so immediate that we cannot possibly be defended at all unless we resort to our own private force; and it is said to cease in right, when members of the same, or of different societies, out of the territory of any society, come into conflict, to the injury of the one party. In this case it is

immaterial how immediate or how remote; how great or how small, the threatened injury is, since the parties are now actually in a state of nature, amenable to no law except that of God and of conscience. When the parties return to a state of society, whether the jurisdiction ceased in fact only, or in right, their responsibility again becomes the same as if the jurisdiction had never ceased. This may be stated as a general rule; but perhaps there may be exceptions.

It is not, however, every immediate injury, or threat of injury, which will justify the right of self-defence in its full extent, when the individuals are living under the same jurisdiction: for an injury, though immediate and certain, may be too small to justify the taking of life, or even the doing of any grievous harm to prevent it. Lesser injuries in society may commonly be adequately repaired after they are inflicted; and when they are of such a character that amends may be made, the principle on which jurisdiction is said to cease in fact, does not obtain. The loss of life or of chastity, for example, is irreparable, and if the individual, when assailed, might not defend himself or herself by all necessary means, at the very time, the party threatened might never be compensated. In such cases, therefore, the law imposes no restriction whatever; the parties are wholly in a state of nature; and the injured one is entitled to ward off the impending calamity by any means which may be called for by the occasion.

There are also some cases where injuries of a much lower sort may accidentally be irreparable; as, for example, where the plunderer of our goods is unknown, or where there is a moral certainty that the society can never interpose for their restitution. In such cases there can be no doubt that great lengths may be resorted to for their preservation, without subjecting us to the imputation of criminally assuming the state's prerogative, or of violating

the greater rights of others in defending our own, which may be of less consequence.

It would lead to much detail and subtile inquiry, were we to examine into the probable law that might affect the numerous cases where jurisdiction may be supposed to cease in fact; as, for example, during civil war and rebellion; or where the magistrate cannot be found; or where he refuses his aid; though as to this last it may be observed, that when this happens, it must rather be supposed that the society has judged the application unfounded, and therefore that an individual thus situate might be bound to submit, whatever might be his right. But there are cases, no doubt, where an individual would be justified in redressing his own wrongs, where a corrupt or ignorant magistrate manifestly disregarded his unequivocal right.

As respects the rights of individuals where jurisdiction ceases in right, cases of great difficulty might easily be mentioned, each dependant on principles which, at this time, it would be premature to discuss. In this case it is to be remarked that the jurisdiction ceases, not from any partial or temporary insufficiency in the society or its functionaries to do justice, but from its having no jurisdiction at all, as in the case of individuals from different states meeting in unoccupied countries, or at sea; and therefore the extent to which the private right may be exercised, and how their rights are affected on their return to society, present questions of some nicety, not easily definable, and on which it is not well to speak positively in such elementary prelections as the present. Thus, to give some idea of the nature of these questions, the individuals, placed perhaps on some lonely island, out of the jurisdiction of any country, may have been subjects of the same state, or of different states; the act committed may be *malum in se*, or *malum prohibitum*, in one only, or in both of the states to which they belong; if illegal in both, the penal-

ties may be different. So, on the other hand, the act done, whether a wrong or a contract, may raise a civil obligation in the country of both parties, or in that of one of them only, or in that of neither, but still in some other country. So, also, the contract may be entirely silent as to the place of its contemplated performance; or its execution may have been designed in the country where made, but where there was no law to enforce it. In all these, and numerous like cases, the rights of the parties, whilst in a state of nature, and after their return to society, might be varied by those different circumstances, which, however, would require more detailed explanation than can now be indulged in.

In the foregoing observations I have blended the consideration of defence and of reparation. But it is proper to state that the right of reparation cannot, like the right of defence, be supposed in any case to exist only for the present instant: it must cease either indefinitely, and of right, or not at all. When an injury is coming on a man, he may be under the necessity of defending himself, or of not being defended at all; but it seldom happens that he is driven to this dilemma in obtaining reparation for an injury; for though defence might be useless, did it not come at the moment, yet reparation may often prove as adequate at one time as at another. This is true, in some degree, even in the case supposed by Grotius, of a man removing out of the territory of that society whose members he has injured; where, if they do not then stop him or his goods, it may be impossible for the society afterwards to have him under control, so as to compel him to render justice. In such a case, although the injured person might be justified in stopping the person or goods, and perhaps both, yet he would have no right to appropriate such goods, as he would, did the jurisdiction cease in the full extent. In fact it only ceases, if at all, so far as to give him a right to stop the goods and person, but not so as to vest in him the

property, in satisfaction of his claim, this being a matter which must be adjudicated between the parties by the magistrate. This, we presume, is the sound doctrine where the laws of a society are silent on the subject. As to an individual's right to reparation, the jurisdiction may cease in fact only so far as to justify his stopping the offender or his goods, but not so as to enable him to satisfy his own demand at once, since an immediate adjustment and satisfaction of the claim are not material, and may well be left to the future decision of the constituted tribunals of the country. But here a question of some delicacy may arise. Suppose the laws of the country have expressly legislated as to the mode of proceeding where the debtor or offender is about to abscond with his property; or, having absconded, his agent is in the act of removing it *extra jurisdictionem*. Suppose the right to stop the goods is itself regulated by law, but the offender or his agent is removing them on Sunday, when no process can be obtained; or, rather, suppose the property is *in transitu*, and there is no time left to obtain the process. Will not the natural law right of stoppage revive, and does not the jurisdiction cease in fact? We presume that it does; for the statutory enactment could not have intended to abrogate the natural right except where an equivalent means is secured to the injured party; it only aimed at regulating the right in all cases where the exigency was not so urgent as to require an instant interference. If, therefore, an individual so circumstanced were to seize the goods, and detain them without any legal process, such a seizure would be no trespass, and would be legally valid perhaps as to every consequence: for suppose the goods, when safely deposited, should be consumed by fire, before any legal process could be procured; the loss, I apprehend, would fall wholly on the offender or debtor. But suppose another creditor should obtain legal process, and attach the goods in

the hands of that creditor who seized them in the manner we have stated: would this wholly supersede the right of such creditor? I should think not, provided he also had obtained legal process at as early a moment as was practicable after his seizure; or if this creditor were in any way misled, or prevented from obtaining process by the act of the attaching creditor. There can be no doubt that in the supposed case of a necessary seizure without process, the party should obtain process as soon as possible, if he would avoid the consequences of interfering illegally with another's property. Should he neglect this, he might become a trespasser, and might be held liable to loss by fire, or the loss of profit on a contemplated sale, and perhaps to any other supervenient loss.

Under the strict notions of the common law of England, some of the foregoing doctrines would perhaps be regarded as wholly inadmissible; for it must be allowed that the genius of that system is too often averse to the mitigating equities of that secondary law of nature which is the soul and excellence of some other codes. Where that common law is silent, the voice of simple justice is scarce allowed, for that reason, to be heard in our courts; whilst, on the other hand, it is often wholly suppressed when the law has spoken, though in terms ever so doubtful or inadequate. But under the more liberal spirit of the general municipal law of most other countries, the views we have ventured, to intimate might be sanctioned. There is a plastic disposition in their laws, which accommodates itself to the exigency of occasions. The purer waters of natural justice happily blend with those which flow in the more formal and artificial streams of positive law. If it be admitted that, in a country of laws, jurisdiction may cease in fact, so as to justify self-defence, there appears to be no manifest reason why it may not equally cease for the protection of property, or the enforcement of a claim, so

far as to authorize the stoppage of the goods of an offender whilst *in transitu*, or the debtor himself, if in the act of absconding. If positive law is silent, and has not given the right, nor taken it away, the power would seem to exist under the secondary law of nature. If this be so, the case would not be varied where the law has authorized the arrest of such property. The particular law must indeed be followed, where the premises on which it can operate obtain; but if the law be not exclusive, if it has not manifestly abrogated the natural right, then the creditor or injured person may resort to it whenever the law cannot be resorted to, for jurisdiction has then ceased in fact. Still, as we have already remarked, the laws of England are probably too jealous to admit of these liberal views of general jurisprudence. When those laws have failed to provide a remedy, the genius of that system would seem to sustain the presumption that none was designed; and when a remedy has been provided, though insufficient to meet all cases, the very fact of legislation is often regarded as necessarily restricting persons exclusively to that remedy. It is thus that, under the auspices of this Procrustean principle, many of the genial equities which find their way into other systems, are often wholly excluded from the scheme of English jurisprudence.

(4.) Of the effects A right no less valuable to man than of civil union on the the right of personal security, is that of right to the fruits of private property. One of the primary mental and bodily exertion. ends of society and government is the security and vindication of this right. The results of our mental and bodily toil constitute the means of our subsistence, and most of the comforts and luxuries of life. Insecurity in such valuable possessions as these, would not only lessen the ardour of exertion, but diminish the enjoyment of them when obtained. The rude tent reared by our hands; the implements made for the procurement

and preparation of our food; the weapons contrived with much toil and skill for our defence; would be of little value if our only security rested on the honesty of our fellow men, or on our own means of guarding them. If our simple wants in a state of nature demand the recognition of the right of property, man in society has much greater need of it; and it is still more essential that this right be cautiously guarded, and firmly secured. The institution of property, in a very limited degree, was no doubt anterior to that of political government: but one of the peculiar excellencies of this government is, that under it men are regularly disciplined in the acquisition of all the means of comfortable maintenance, and the fruits of their mental and bodily toils are secured to them. Man is not only permitted, in civil society, to enjoy in peace and safety what would be sufficient for the supply of all reasonable wants, but he may amass and treasure up immense wealth, or expend it at pleasure by placing around him all that may gratify the eye and ear, or minister to the enjoyment of every sense. He may create a fairy region, where every breeze diffuses a thousand perfumes, and every vista is crowded with the beauties of nature and art; and all this may be done in conscious and actual security, if not against the envy of others, at least against their violence. Not so in a state of mere primary society. There, indeed, the food and miserable habitation of man may be partially respected; but it is in political society alone that we find secured to us all that adorns life, and renders it truly desirable. In policed society, not only the fruits of our manipulations and bodily exertions are respected as property, but also the productions of the mind. Were not this the case, the sciences, which minister so largely to the arts, would have remained comparatively stationary; whilst the arts themselves must have continued extremely crude, and industry have been satisfied with supplying little beyond

the necessary wants of man. But how great is that stimulus to exertion, which is given to the pure intelligence of our species by the consciousness that intellectual toils shall result in positive and secured benefits! The mere pleasure of doing good to others by enlarging the bounds of knowledge, and the more powerful motive of ambition or fame, could never have advanced knowledge to its present wonderful extent, had not the selfish consideration of property in the fruits of mental exertion, been added to them. Hence is it that, under the most enlightened governments, *literary property* is protected by express legislation. It is respected and firmly guarded during the period to which it has been deemed politic to limit its continuance; for this species of property, for reasons peculiar to itself, is not allowed to endure in the author or inventor forever, as is the case with all other property. Authors and inventors have in their respective works a right of property, since they can neither be used nor published, nor in any manner availed of by others, without their permission. An author, inventor or discoverer is under no obligation to publish to the world the fruit of his intellectual exertions: he has a property in his ideas and principles, or the manner in which they are combined and applied, and any one is amenable who invades such a right; as much so as if he infracts the right to external and visible property. If an author or inventor has not published his book or invention, but it is taken from him, and disclosed to the world, the wrongdoer would be responsible in damages, not merely to the extent of the value of the paper and ink, or of the materials expended in illustrating an invention, but for the value of the combination and application of ideas and principles, as far as such value could be estimated. When, however, an author or inventor has himself published the results of his mental toils, they become subject to the common and free use of the whole world. But as literary property, when

kept to the sole use of the author, is often of little value to him, and of still less when published to the world, whereby all possess in it an equal advantage, it has been the policy of most governments to stimulate the ardour of literary exertion, by securing a property to authors &c. for a limited time after they have published their works, discoveries and inventions. Something of this kind has been done in most countries; but it must be admitted, and with regret, that governments have often either gone beyond, or fallen short of the true principle which ought to sustain this species of property. The Roman law, in one of its enactments, strongly manifests its respect for the labours of the mind. If works of genius or invention happened to be bestowed on the materials of another, as, for example, if a painter had drawn on another's canvass, that law gave the canvass to the painter, and not the delineation of genius to the owner of a worthless tablet. But some authors accuse the imperial law of a great departure from its own principles, in giving to the owner of parchment whatever may have been written on it by another. It is probable, however, that its consistency may be vindicated by distinguishing between the mere mechanical operation of writing, and that of originally composing on the parchment of another. The Roman law certainly did give to the owner of the materials, that which was copied or mechanically written on them; but it is not so clear that an oration or poem, composed on the papyrus &c. of another, belonged to the owner of the materials. If this were the case, it would certainly be at variance with the principle which gave the canvass to the painter; and that principle is (as stated by the Institutes) that the labour, not being a mere manipulation, but one in which the mind has generated something, is entitled to merge the claim of the owner to the inconsiderable materials employed in calling it into visible existence.

(5.) Effects of civil union on the right to Reputation. In a state of primary society, a good name was no doubt of great value to its possessor, as it was the principal source

of his subsistence, and the only means of maintaining an intercourse with his fellow men. None are more tenacious of reputation than those rude tribes of Asia and America, whose simple intercourse requires honesty and good faith towards each other, without which their little possessions would be of no value whatever.

Civil societies have also recognized reputation as a valuable right, worthy of being guarded by express laws. Hence the codes of various nations contain enactments of the severest kind against defamation. The Roman law at one time punished the libeller with death; and the emperor Valentinian made it a capital offence even to omit destroying libellous productions, which imputed any capital offence to the person libelled. The emperor Augustus ranked libelling with high treason, and this was continued by Tiberius and Sylla, in the case even of private calumny. But as in the time of the republic the crime against majesty was restricted to such acts only as really affected the sovereignty, this severe extension of the penalties against defamation was abandoned by Titus and Vespasian, and the punishment of libellers and slanderers came to be regulated by defined laws, and more sound principles, as we find in the celebrated Constitutions of Constantine, in the Theodosian code, entitled *De Famosis Libellis*. These last are the basis of the common law of England on this subject, as will be found on examining the judicial decisions under the head of Actions of Slander, reported by Lord Coke in the fourth book of his Reports; as also in the numerous Star Chamber cases on this law, which defined most of the principles to which the English and American courts resort at the present day

That reputation should be regarded as a natural and perfect right, of great value, and well entitled to the special protection of the laws, appears to have been acknowledged by nearly all nations, and in every age. It is said that by a law of the Lydians, slanderers were to be blooded in the tongue, and the applauders and listeners, in the ear. Solon, having regard to public decorum, and the peace of families, made it penal to slander even the dead; and the polite Athenians, who respected oratory perhaps as much as any people who ever existed, would not permit their publick speakers to indulge in opprobrious language. If the anecdote recorded by Plutarch of the sculptor Phidias, be true, even artists were to be on their guard how they delineated what they conceived to be the historical events of their country: for that sculptor was prosecuted for a libel, for representing on the shield of Minerva, circumstances which brought into doubt the early history of Athens, and of its great founder Theseus.

We find, likewise, in the laws of most countries, a distinction taken between verbal and written slander; also, between the slander of those who are in power, and of such as are mere private individuals. We find, too, that the truth of the matter imputed did not always excuse the person who uttered it; as, for example, where it related to some bodily or natural infirmity, or to some crime or offence which had either been pardoned or satisfied; or, as among the Athenians, where the defamation related to a person's trade. In some countries, also, the truth of the accusation is no ground for the avoidance of a publick prosecution, as the principle which sustains such an interference of the publick, is that it is conducted, not on behalf of the person accused, but merely for the prevention of such open and notorious imputations as must necessarily tend to excite the party accused to revenge, and thereby injure the peace of society: for as the truth of the accusation would rather

aggravate than lessen the desire of revenge, the offender, has transgressed against the publick peace, though he may have done no injustice to the individual impugned.

Reputation may be injured in three ways; first, by defamatory words, usually called slander or scandal, which the laws of most societies regard as a mere private injury, for which the party has redress by an action for the recovery of damages. Secondly, by libel, or defamatory publications in writing or print, or by signs and pictures, which is generally regarded as an offence against the publick, as well as the individual, and is redressed by a publick prosecution at the suit of the state, and a private action by the person libelled. Thirdly, by malicious prosecution, which, in like manner, may be the subject of both publick and private redress.

Thus are the natural rights of man extended, defined, guarded and vindicated in civil society, in the three points we have commented on, viz. 1. Exemption from personal injury; 2. The protection of private property; and 3. The preservation of reputation. We are now to consider the fourth main object of the civil union, viz. the security of personal liberty.

(6.) Effects of civil union on the right to Personal Liberty. The Personal Liberty possessed by man in a state of nature, or of primary society, is also considerably modified by the act of political association. These changes will sufficiently appear when we examine the distinctions made in the books between natural, social, civil, political and relative liberty. We propose to give a short explanation of each of these terms.

1. NATURAL LIBERTY. This, as the phrase expresses, is that which we enjoy in a state of nature. You may remember that in a former lecture we spoke also of savage liberty, if, indeed, it be proper to use a phrase which implies moral rules, to express a state which sets them all at

defiance. It sufficiently expresses, however, the idea we mean to convey, viz. the physical power of doing what we like, regardless of all obligation whatever. It is perhaps unnecessary to say that there cannot be supposed to exist a moral power to act in such a way, though it has been urged by some, that as God has interposed only prospective punishment in most of these cases, the agent is under no actual restraint from doing the evil, if he will encounter the punishment. I might involve you in much intricate metaphysics by pursuing this point; but to little, and perhaps no advantage: we may therefore dismiss it by merely observing, that savage differs from natural liberty in this, that the last gives us the power to do such things only as are consistent with the law of right reason. A man, consequently, is in the complete possession of his natural liberty, who is under no other restraint than what his conscience and reason dictate to him as the precepts of the law of nature. He is under no engagements to any community or individuals, nor has he connected himself with any civil society: he is therefore independent of all obligations, except those which his nature, or divine positive law has revealed to him. But as soon as man enters into any association with his fellows, he must part with a portion of his rights; for hardly any combination, for any purpose whatever, can be conceived, which does not require some sacrifice of individual will; and, indeed, this is necessarily the case in all associations, unless it be a rule of the body, that nothing shall be transacted unless by the unanimous consent of its members. The end, therefore, of any union that would probably take place in a state of nature, or of primary society, cannot be accomplished without an abridgment of individual liberty, exactly as far as may be requisite to insure the end. Natural liberty is justly esteemed the greatest blessing of human life, and the most excellent attribute of the human mind. It is consequently bartered away or restrained

only for the purpose of procuring, on the whole, some greater good, or rather for the purpose of rendering this valuable possession more extensively and variously useful; and this is the only measure of its protection and limitation under the laws of political societies.

2. **SOCIAL LIBERTY.** This is natural liberty limited and regulated by the ends of mere primary society, that is, as it is manifested by matrimony, temporary defence, hunting in company, or any other transient and partial object, short of those of civil society. We carry with us into political society such a portion of our social liberty as is consistent with the more enlarged scheme of political association; for man, whether in a state of nature, or of primary or political society, is still essentially the same being; and it is the great design of government and laws to enlarge, restrict and modify all our natural and social rights and duties, so as to produce the greatest share of human happiness. This is effected mainly by clearly defining the nature and extent of our liberties, and securing us in their full enjoyment.

3. **CIVIL LIBERTY.** This is also natural and social liberty, modified by law, as far as the united ends of the social and political union require. This definition differs essentially from that given by several writers, who, as they find natural liberty defined to be the power of acting as we please except when restrained by the natural law, infer that they properly describe civil liberty as a like power of acting except when restrained by civil laws. It is, however, extremely manifest that this cannot be correct, as it leads directly to the absurd conclusion, that whatever is enacted by a civil law, however unwise the enactment, can be no invasion of civil liberty; a conclusion greatly at variance with all experience, and essentially erroneous in principle. The error, we conceive, lies in referring the consistency spoken of, to civil laws, instead of the civil

compact, or the ends of all political associations. If we mete out civil liberty to men, and call them freemen because they are only restrained by civil enactments, they may have any measure of civil liberty, and yet be the veriest slaves of the most cruel despotism; for though these enactments should all be written, certain and comprehensible laws, they may be severe, vexatious and arbitrary. It is obvious, then, that this cannot be a sound definition of civil liberty, and that none can be correct which does not refer the restraint of our natural and social liberties to the ends or design of the social and political compacts. Another objection to this definition is, that as many restraints are imposed by the mere act of civil union, without the aid of any civil law, there would, (according to the terms of it) be no civil liberty in any political community, as there are many existing restraints of natural liberty which are altogether independent of any positive enactments. The unsoundness of this definition is further manifested by another singular conclusion which would seem to result from it, viz. that the more civil laws are multiplied, the more is civil liberty circumscribed; or, in other words, the more laws, the less liberty, because every new law is creative of some restraint which did not exist antecedently. Now, on the contrary, it is the pride of free states to enact laws for the preservation of their liberties; and many doubts are solved, and difficulties removed by express enactments, which are often so many guards against oppression, and enforcements of civil liberty, and by no means general restraints by which our liberty is circumscribed. Who, for example, could suppose for a moment that the statutes of *Magna Charta*, 17 of John, and 9 Henry 3; or the thirty-two statutes confirmatory of that great charter, from the reign of the first Edward down to that of Henry 4; or the statutes of Habeas Corpus, the 16 and 31 Charles 1, &c. &c. who, we say, could regard all these but as so many abridgments

of civil liberty, instead of the sure and defined sources of it? But if we adopt the definition now suggested, none of these difficulties arise; for by referring the modifications of our natural liberty solely to the ends of the political union, and not to the laws of the society, we perceive at once how it is that numerous laws are not only consistent with civil liberty, but, in fact, may be the strongest bulwarks even of our natural rights, and the best contrivances to prevent their invasion. The act of civil union, therefore, and the creation of a magistracy, with the delegation to it of legislative and executive powers, are not acts by which men yield up their freedom of action, but a composition between them and their foes, (for such are the unquiet and unjust, who render government and laws necessary,) whereby they bargain away an uncertain and unproductive liberty, for a defined, regular and secured freedom; and it is, at the same time, a compact between them and the just, for the prosecution of useful ends. Any one, therefore, who submits himself to the guidance of a community, gives up his licentiousness, and not his liberty. In further support of this view of the subject, we should also bear in mind, first, that a man cannot strictly be said to yield up a right, when he obtains an equivalent right in exchange, which is obviously the fact in this case, where all the members of the community come in on the same terms: secondly, that, in truth, the man retains as a member of the society, the right which as an individual he surrendered to it: and finally, that by the act of civil union individuals associate into one general tribunal for the judgment of each. Hence, they cannot be said to abridge their own liberty by yielding obedience to the injunctions of this tribunal, any more than when a man determines of his own mind to pursue any particular conduct; for being a party to all the decisions and injunctions of the tribunal or society of which they are members, they cannot be said to abridge their own

liberty. Nor does it alter this reasoning, that the powers of government are sometimes delegated to one, or a few select persons, since the laws of nature must forever recognize the individuals of the community as the fountain of all legitimate power, and the only arbiters in the last resort. Under this view, the rule for judging whether the civil liberties of a nation, or of any of its members have been invaded by those entrusted with authority, is a plain and brief one, although it may sometimes be a rule of extreme difficulty and delicacy in its practical application. In all such cases the simple inquiry is, do the objectionable laws &c. carry restrictions further than the ends of the civil union require? Are they demanded by a comprehensive view of all the necessities of the case? Have they secured the civil liberty of the whole from the attacks of individual licentiousness? The replies to such inquiries must determine the justice of the laws in question. We will only add, that when we thus define civil liberty to be as much natural liberty as is consistent with the obligations of the social and civil union, there may be a sort of implication that the social or political compact does in some degree restrict our liberty, by an actual surrender of rights, without a correspondent equivalent. But this, as we have explained it, is by no means the case; for, in the first place, if any thing were given away, it was licentiousness, not liberty: secondly, a right cannot be said to be given away, which was compensated by another of equal or greater value: and thirdly, nothing is given away which is merely transferred from a man in his individual capacity, to himself and others as members of a community; for as every other member of the state has done the same thing, it is nothing more than a transfer of power from one capacity to another capacity, with defined ends. On the whole, therefore, it appears sufficiently clear that society, government, and wise laws imply rather an augmentation than

an abridgment of liberty. For when we compare the state of nature, or of primary society, with that of civil society, we find the liberty of the latter exceeds that of the former in the proportion that the secure enjoyment of natural and adventitious rights excels the irregular and uncertain acquisitions we might make in a state wherein caprice and injustice were more frequently the arbiters of our rights, than wisdom and honesty.

Let us now proceed to the consideration of

4. **POLITICAL LIBERTY.** This is frequently confounded with civil liberty; but Mr Christian has correctly defined political liberty to be the security with which, from the constitution, form and nature of the government, the members of the community enjoy their civil liberty. The greater share its people have in the government, the greater is their political liberty; and, of course, the better guarded will be their civil liberty.

Though civil liberty may be enjoyed under a monarchy, or even under a despotic government, yet, as the subjects have no security for it, they have no political liberty. This distinction between civil and political liberty is comparatively of modern origin. Formerly, it was only hinted at by writers on natural and political law, who appeared to have some indistinct notion of the necessity of thus distinguishing them, but did not themselves see the distinction sufficiently to explain it with clearness to others. Rutherford, in speaking of civil liberty, views it as either that of the several members of the community, or that of the entire body politic. 'The civil liberty of the individuals,' says he, 'implies freedom from all except civil subjection; but the civil liberty of the whole body implies freedom from all subjection.' 'Civil subjection,' continues he, 'is consistent with the civil liberty of the several members, but not with that of the collective body; for whenever a society has proceeded from that perfect democracy which

results from the first union of individuals, called primary society, it will depend on the nature of the subsequent government whether the civil liberty of the whole remains or not. Thus, an absolute monarchy puts an end to it; for then the collective body must act by a judgment and will which are not in its own keeping; and thus we may understand why, on the change of a government from popular to monarchical, a nation is said to have lost its liberty.* It is manifest from the foregoing observations of Rutherford, that he aims at distinguishing between civil, and what has more recently been called political liberty, as contradistinguished from civil, the latter being, according to Dr Priestley, 'the power which the community leaves the citizen possessed of with respect to his own conduct, and the former the share he may have in directing the affairs of the society.' 'There may be states,' says this writer, 'in which all the members may have an equal share in making the laws, and yet these may be so severe as to leave them very little power over their own actions. So, also, men may be left by a mild code of laws to think and act very freely for themselves, and yet be excluded from all share in the government. But as the enjoyment of their privileges would in this last case be very precarious, it is obvious that political liberty is the only safeguard of civil.'

But political liberty has itself been distinguished into two kinds, viz. as it regards the state on the one hand, and the members of the community on the other. The former may perhaps be called publick political liberty, and the other private political liberty. The learned editor of the 'Commentaries,' Mr Tucker, defines the first to be 'an absolute and unconstrained power of self government, subject to no control but the laws of nature and nations.' Would it not be better, however, to denominate this indepen-

* 2 Ruth. Inst. 374 to 388.

dence, and to call the other political liberty merely, and without the adjunct word, 'private?' The recent attempt of France to interfere with the government and internal policy of Spain, was an invasion of her publick political liberty, or independence. So, likewise, in the case of conquered countries, this publick political liberty may be gone, although the civil liberties of the people may remain unimpaired, and even though the private political liberty continue nearly the same as formerly. The same remarks may apply to colonies.

The second species of political liberty, viz. that which regards the members of a community, has been likewise considered in two lights; first, as applied to the publick functionaries of a state, in which case it consists of the free exercise, enjoyment and security of their political rights and privileges, according to the constitution and laws of the country; and secondly, as it regards the private individuals of the nation, in which case it consists in the security with which the people enjoy their civil liberties; and that security is in proportion to their participation in the affairs of government. These two kinds of political liberty are treated by Montesquieu in the eleventh and twelfth books of 'The Spirit of Laws,' under the heads 'of laws which form political liberty with regard to the Constitution,' and 'of laws which form political liberty as relative to the Subject.'

Mr Macaulay, in his 'Rudiments of Political Science,' has found fault with the whole of the distinction between civil and political liberty. That writer, and others who think the distinction unimportant, and that no other expression need be used than 'civil liberty,' seem to sustain their opinion by views somewhat like the following. It is evident, say they, that the phrase 'civil liberty' necessarily implies something more than mere freedom from restraint, and that it also imports something beyond what Montes-

quieu has called 'relative liberty, or the faculty of doing whatever we will, unless restrained by force or law.' This being the case, and as it imports not only the mere actual state of a citizen or subject, but also the secured right of directing his own actions, within certain limits; that secured right may be based either on the merciful edicts of an absolute monarch, or on the laws which the subject himself has a share in making. If civil liberty be consistent with an absolute government, the subject or citizen cannot with propriety be called free, as there is no security by law for its continuance; but it flows from the mere will of the monarch. In such a case, the subject indeed may be actually and temporarily free; but he cannot be said to be civilly so; he does not enjoy civil liberty. Freedom should not be regarded merely as a state or condition in which the people do in fact direct their actions; but as one in which they have guaranteed to them the perpetual power and right of so doing; and this is civil liberty, which is all that is embraced under the compound idea of civil and political liberty. In this view of the subject, no such phrase as political liberty is required, because civil liberty means all that political liberty can mean, and also all that civil liberty, as distinguished from it, means; and mere freedom from restraint or oppression not being liberty at all, needs no name for its designation. These views in opposition to the use of these two phrases in the distinct senses we have mentioned, are certainly plausible; but, we apprehend, not entirely correct. The topic, however, need be no further pressed. We think the phrases thus understood have become too much used, and are now found too convenient, to be abandoned. They certainly can do no harm, whilst they keep more distinctly separate, ideas which have been often blended, and are sometimes considered as identical.

Sufficient has perhaps been said to render obvious to the student the distinctions between the various kinds of liberty of which we have spoken, and thus to illustrate the different modifications of our natural personal liberty, consequent upon entering into the numerous relations to which political society gives rise.

As to the extent to which personal liberty is alienable, we have nothing further to add to what was said in a previous lecture, except that, whatever difficulty we may find in fixing the limits within which rulers and people, pressed by necessity and tyrannical power, may make compacts to bind themselves and their posterity, there seems to be no principle in the law of nature which obliges men, on the one hand, to sacrifice privileges essential to the just government of life and thought; or allows them, on the other, to exercise over the unfortunate, the weak, or even the base, a power which implies the right to make them yet more unhappy and wicked.

We have now brought to a close what we had to say as to the general effects of society and government on the Natural Rights of Man.

In the ensuing lecture we shall consider the various definitions, the nature, properties, and different kinds of law.

LECTURE VII.

OF LAW, AND ITS GENERAL PROPERTIES.

(1.) Introductory remarks. BEFORE we examine the properties common to all laws, or those which distinguish them into various classes, it is proper that we should endeavour to ascertain the precise import of several terms and expressions which, common as they are, have not been clearly defined, and of which the definitions have been extremely various. I allude to the terms 'Law,' 'The Law,' 'A Law,' 'Jurisprudence,' 'Municipal Law,' 'A Municipal Law,' 'Statute' &c. It is also necessary to advert to the *abstract* and *concrete* significations of law, and explain the confusion and error of many definitions, consequent on not distinguishing between law as a *genus*, and law as a *species*.

(2.) Of Law in the Abstract, and in the Concrete. 'Law,' 'The Law,' (not meaning a particular law) are *abstract* terms, and, as collective or generical expressions, merely import the totality of individual laws, contemplated as *one body*, without reference either to their origin or application. In this point of view Law is an *ens rationis* merely, there being no actual entity correspondent to the term; nor can any very definite meaning be collected from it. These terms, indeed, are not often used to import the full extent of their abstract signification, being more frequently used in a sense so far concrete as to refer to some particular system of law, and yet in a sense so far abstract as to have no direct reference to any particular

law of that system. If, for example, a Roman lawyer were to say 'law, or the law, forbids ingratitude,' he would use these terms in a sense somewhat concrete as well as abstract, and different from what the same expression would import, were it used by a British lawyer. The civilian would chiefly allude to the Roman code, which punishes ingratitude in various instances; and he might also allude remotely to the particular laws against ungrateful *freedmen* and *donees*, both of whom were punished; the former by being recalled into bondage; the latter by the revocation of the things given. The British lawyer, on the other hand, would have a much less definite idea, and, at most, would be supposed to allude to the *jus naturæ* generally, or to that strong sense of detestation entertained by mankind against ingratitude of every kind; since in the English system there are no laws respecting it in any case whatever.

Law in the *concrete* signifies some particular rule of action that must be observed in order to avoid some sanction of a physical, religious, moral or civil nature; or (as is sometimes the case with human laws) in order to attain some corresponding good; leaving the party who violates the law as he was before, except with the loss of a potential gain. Be the sanction, however, what it may, and whether punitive, merely remunerative, or both, it is still a law, as it obliges the person to its observance, if he would avoid the punishment in the one case, or obtain the advantage in the other. Law in the concrete always supposes some certain and known superior, competent to prescribe the rule, and to enforce or execute the sanction. Hence, in this concrete sense, laws, as far as they regulate human conduct, admit of a fourfold division, viz. into Divine, Natural, International, and Civil or Municipal; there being no other conceivable moral laws than those expressly revealed to us by God; or such as are dictated to us by the

light of reason and conscience; or such as are agreed upon, or submitted to, by sovereign nations for the regulation of their intercourse with each other; or, lastly, those directed by a community to its individual members, or to the whole body politic for its own government. The three last mentioned classes of laws are properly embraced in a book of jurisprudence, and form the only subjects within the scope of legal inquiries.

In most languages we find appropriate words to distinguish the abstract from the concrete sense of the word law. Thus, in Latin, we use the term *jus* for the former, *lex* for the latter. *Jus* imports a system of laws, or the abstract consideration of that scheme of duty which arises from many or several rules or laws put together. It signifies the *genus*, comprehending all the unwritten as well as written law; and of it *lex*, or a particular law, written or unwritten, is a *species*. Thus, we say *Jus gentium*, not *Leges gentium*; and *Jura personarum*, not *Leges personarum*.

Lex, however, is sometimes used abstractly, and in lieu of *jus*, but never when it refers to a definite law. A civilian would never, for example, say *Jus Julium*, *Jus Cornelium*, *Jus Horatianum*, *Jus Papia-Poppæum*, instead of *Lex Julia* &c.; but he would say *Jus Honorarium*, as this imports no particular law, but a general system, made up of the edicts of the Prætors and Ædiles. So, in French, the word *droit* expresses the abstract, and *loi* the concrete signification of the word law. We do not say *Loi*, but *Droit de la Nature*. The Spaniards have also *ley* and *derecho* as correspondent terms; the Germans use *gesetz* for the concrete, and *recht* for the abstract; and the Italians use *legge* and *diritto*. The English, perhaps, has no words expressive of these distinct significations. The word law is indifferently used, and the two meanings can be expressed only by the use of additional words.

The old English, indeed, had the word *right* to express the abstract sense; hence the term *Folk-right*, meaning the people's-law; but this use of the word is obsolete, unless, perhaps, the expressions 'Rights of persons,' and 'Rights of things,' should be received as importing the same thing as *laws* of persons &c. using the words *rights* and *laws* abstractly, and as strictly synonymous with *jura personarum* &c. Some, however, may object to the use of the words *jura* and *rights* as importing *laws* in the abstract, and may contend that the word 'rights' in those several expressions should not be rendered by the word 'laws,' but by the word 'rights' in its ordinary acceptation; meaning thereby certain qualities vested in us, whereby we justly claim the power of doing certain actions, and of possessing certain things, and not as synonymous with the word 'laws.' If that rendering be the more correct, we have then no word in our language expressive of the distinction so often alluded to.

(3.) Various Definitions of Law, and the reason of their general incorrectness. Logicians have made many nice distinctions as to the nature and several kinds of definitions. The *thing* itself may be defined, or only the *name*. The definition may be strictly logical, or without regard to the rules of that art: hence the schoolmen have divided definitions into four kinds, Nominal, Real, Accurate and Inaccurate, the last of which takes the name of Description. Every species of definition, however, should aim at distinguishing the matter defined from all other things. Neither the thing defined, nor synonymous names, should form a part of the definition; and it should agree with every *species* comprehended by the *genus*, and not merely with a part of the genus, and a part of the species. So, in defining things or words, either the genus or the species should be comprehended, nor should it be doubtful to which the definition applies. The inaccuracy and uncertainty of

many definitions that have been given of the term Law, arise either from defining the *species* where the *genus* was intended, or *è converso*. The difficulty and danger of definitions have been often adverted to by writers; and their great utility, when correctly framed, has also been equally commended. Swinburne, a learned and accurate legal author of Elizabeth's time, in the early part of his great work, remarks that 'definitions are said to be dangerous in law; the cause whereof is the multitude of different cases, the penury of apt words, the weakness of our understanding, and the contrariety of opinions; for among such variety of things, either we cannot discern the true essence thereof, or we do not aptly deliver what we conceive; or else, these perils being past, at least in our own opinions, yet are we still subject to the rigorous examination of all sorts of men, and must abide the verdict and sentence of the deepest judgments. And it is rare if one man at least, among so many, do not espy some defect or excess in the definition, whereby the same may be subverted. Which thing if it come to pass, then the definition being overthrown, all the arguments drawn from thence, and whatever else dependeth thereupon, is in peril to be overturned. No marvel, then, if definitions be reported to be dangerous. But if, contrary to the common course, the definition be so just that it cannot be fairly reprov'd, then it is profitable, and so necessary that from thence, as from the root and fountain, every discourse ought to take this beginning; the rather, for that thereby (amongst many other benefits issuing from definitions) the whole nature of the thing defined is plainly declared, and that in few words.'* Had legal authors generally been duly impressed with the views of this writer as to the caution with which they should frame their definitions, there would have been less occasion

* Swinburne on Testaments and Last Wills, part 1, sec. 3.

than now exists, to examine them critically. The following are the most celebrated definitions of law in the abstract and concrete, that have been given from the earliest times to the present day. They are stated somewhat in chronological order, and the defects of some of them will be briefly noticed.

1. 'The design and object of laws is to ascertain what is just, honourable and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which, for various reasons, all are under an obligation to obey; but especially because all law is the invention of *Heaven*, the resolution of *wise men*, the correction of every *offence*, and the *general compact* of the state; to live in conformity with which is the duty of every individual in society.' DEMOSTHENES, Orat. 1. cont. Aristogit.

2. 'A law is a *form of words* prescribed by the *general* consent of the City, directing every member thereof how to act *on all occasions*.' ARISTOTLE, Rhet. ad Alex. cap. 1.

3. 'Positive law is in all respects a *contract*. The parties contracting are the governors and the governed. On the side of the public it is stipulated by the laws, that a general security shall be maintained; that every person who is a party to the contract, shall have his just rights protected; and shall not be molested by any act of violence to his person or property; or, if molested, upon a proper complaint, he shall find the laws ready to avenge his quarrels, and that they can punish as well as prescribe.' ARISTOTLE.

4. 'Law is the distinction betwixt justice and injustice.' '*Est lex justorum injustorumque distinctio.*' '*Lex est summa ratio insita à naturâ, quæ jubet ea quæ facienda sunt, prohibetque contraria.*' CICERO, de Leg. c. 2.

5. 'Jurisprudence is the knowledge of things divine and human; the science of what is just and unjust.' '*Jurisprudentia est divinarum atque humanarum rerum no-*

titia, justi atque injusti scientia.' JUSTINIAN, Inst. lib. 1. tit. 1. sec. 1.

6. 'Jus civile est quod quisque sibi populus constituit.' JUSTINIAN, Inst. lib. 1. tit. ii. sec. 1.

7. 'Law is an *art* of well ordering civil society.' SIR HENRY FINCH.

8. 'Law is a just *statute*, ordaining what is right and honest, and prohibiting the contrary.' '*Lex specialiter significat sanctionem justam, jubentem honesta, et prohibentem contraria.*' BRACTON, lib. 1. cap. 3.

9. 'Law is a rule of moral conduct, obliging men to do what is right.' '*Regula actuum moralium, obligans ad id quod rectum est.*' GROTIUS, lib. 1. cap. 1. sec. ix.

10. 'In general, a law may conveniently enough be defined a *decree* by which a *sovereign* obligeth his subjects to conform their actions to what he prescribes.' '*In genere autem lex commodissime videtur definiri per decretum, quo superior sibi subjectum obligat, ut ad istius præscriptum actiones quas componat.*' PUFFENDORF, lib. 1. cap. 1. sec. 4.

11. 'Law is a rule of action imposed on a *subject* by one who has power over him.' BISHOP SAUNDERSON.

12. 'Law is a rule of acting or not acting.' DAWS' Orig. Laws, 4. 14.

13. 'Law is that which assigns unto each thing the *kind*, moderates the *force*, and appoints the *form* and *measure* of working. HOOKER, Ecclesi. Poli. 2.

14. 'A law is the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what any of them may do, and what they must forbear to do.' HOBBS' *Dialogue between a Lawyer and a Philosopher*. Works, 598.

15. 'Laws, in their most general signification, are the necessary *relations* resulting from the nature of things.' MONTESQUIEU, vol. 1. 16.

16. '*Law* is a rule prescribed by the *sovereign* of a society to his subjects, either in order to lay an obligation of doing or omitting certain things, under the commination of punishment; *or* to leave them at liberty to act or not in other things, just as they think proper, and to secure to them, in this respect, the full enjoyment of their rights.' BURLAMAQUI, Inst. Nat. Law, chap. viii.

17. '*Law* is the will of a *superior*, sufficiently notified in some way or other, by which will he directs either all the actions in general of *those* who depend on him, or at least of all those of a certain kind, so that, in regard to such actions, he either imposes on them a necessity of doing or not doing certain things, or leaves them at *liberty* to act or not act, as they shall judge proper.' BARBEYRAC, Note 5 on Grotius, lib. 1. cap. 1. sec. ix.

18. '*Law* in the *genus* is that *faculty* whereby some lawful superior prescribes rules of action which *those* in subjection are obliged to perform under certain penalties, express or implied. DAGGE, Criminal Law, vol. 1, 2, vol. 2, 95.

19. '*Law*, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational; and it is that rule of action prescribed by some *superior*, and which the inferior is bound to obey.' BLACKSTONE's Comm. 1 vol. 43.

20. '*Civil* or municipal law is a rule of civil conduct prescribed by the *supreme power* in a state, commanding what is *right*, and prohibiting what is *wrong*.' BLACKSTONE, Comm. 1 vol. 44.

(4.) Observations Without intending to indulge in hyper-critical remarks on the foregoing definitions.

tions, it may be justly said that they are generally far from accurate, and that most of them are obnoxious to the charge of not properly distinguishing Law

from a positive law. Several of them are rather descriptions than definitions; others are neither the one nor the other; and many of them confound different *species* of law with some other species, or with the *genus* law. A few observations on each of them, in the order in which they are enumerated, will perhaps justify this comprehensive censure.

No. 1. The beauty of this description of law by Demosthenes has been often a theme of admiration; and Mr Christian regards it 'as the most perfect and satisfactory description of law than can be conceived.'* We concur in the opinion respecting its beauty, but are inclined to think the praise overcharged, which considers it as 'perfect' and entirely 'satisfactory.' If law be in part the invention and gift of Heaven; in part the precepts of wise men for the correction of offences; and lastly, if it be also in part a general covenant of the citizens, by which their conduct is to be regulated; and if, from the excellence of its threefold origin, it is clothed with authority; the description is not very explicit as to the grounds of that authority, nor is any thing said as to its sanctions. As far as law proceeds from Heaven, it is authoritative, and no sanction need be adverted to; but the wisest precepts of the wisest and most virtuous of mankind are not necessarily authoritative or obligatory; and if they were, the right or power to enforce them by sanctions should appear. Again, if obligation be consequent on the precepts of wisdom, *offences* would not be the only objects of these precepts: and lastly, if laws also proceed from a *general compact* of the citizens, how are those citizens bound by them who have not consented to their enactment? If they all consent, it may be a law and a compact both; and it would be law as to those also who did not consent, had the description provided any

* 1 Blackstone's Commentaries, 44. Note.

other source of civil or positive laws than general compact. In this respect the description is also unsatisfactory, since valid laws may be made by lawful human superiors or sovereigns, binding even on those who dissent; and this is the case even in a democracy, where the majority of the people is the superior or sovereign over all others within the community. Hence, legitimate laws would seem to arise only from God; from the consent of all who are bound by them; and lastly, from the authority of some lawful earthly superior, though against the consent of those affected by the law. But perhaps it may be said that 'the general compact of the state' mentioned in the description, refers to the first political union, and not to the making of the laws themselves in virtue of the power conferred by that compact; and that therefore the laws are binding on the minority because the compact itself must be presumed to have settled the principle, that all laws constituted by the majority shall be equally obligatory on all. This may possibly have been the meaning of the orator, but it is not so expressed. If such be the meaning, it redeems his description from the imperfection last attributed to it.

No. 2. This definition by Aristotle is liable, we think, to two objections. *First*; it confounds the *statute*, that is, the *form of words*, with the *precept* or law itself. This, indeed, is a very common error. The statute is the mere *physical* entity, and may contain within its limits a great variety of precepts or laws. A law is a single and distinct precept; it is the *intellectual* entity evidenced by the statute. Should a statute comprehend many precepts, as is generally the case, it must be regarded as containing so many distinct laws, exhibited by a form of words set forth in one instrument; so that every distinct order, even though in the same section of a statute, is as much a law as if declared by a distinct statute. The popular notion of a law comprehends, indeed, all that happens

to be embraced by any ordinance of the lawgiver; but the just idea is that just stated; and, as respects the form of words, it would be better, perhaps, were all the distinct precepts or orders of a statute evidenced by at least as many distinct sections. Were this more frequently done, there would be less cause for judicial interpretation than exists at present.

Secondly. Aristotle intended this as a definition of civil law generally, and not of *a* civil law. This appears by the words 'on all occasions:' hence it would have been better had the word 'civil' or 'municipal' been used, instead of the particle *a*. The words 'general consent' likewise, (unless they refer to the original power conferred on the community to make laws, and thereby to bind the minority,) are at variance with the rest of the definition, which speaks of the laws themselves as prescribed by that general consent. This imparts to the definition the same obscurity I alluded to when remarking on the description of law by Demosthenes.

No. 3. In this description of positive or civil law, Aristotle has been more happy. It justly refers the origin of all such laws to the consent, express or implied, of the governed; and describes, in a general way, the objects of civil laws, and the power of the organ by which they are constituted, to enforce their observance.

No. 4. The principal objection to these definitions by Cicero is, that, while they aim at defining law as a *genus*, they define merely the law of nature, which is one species only.

No. 5. This is not a definition of law either as a genus, or a species; either in the abstract or the concrete. The term 'Jurisprudence' is indeed itself altogether an abstract one. If it means the *totality* of laws, having no regard to their origin, nature and application, or if it signifies the *science* of universal law, it has in either case no-

thing in common with *a law*. The science which explains law, or the volume or code which contains laws, has in it no one property of law. Justinian evidently meant nothing more than that the science of jurisprudence relates to the conduct of all intelligent beings, and that it is partly of divine, and partly of human ordinance. But when he subsequently speaks of it as 'the science of what is just and unjust,' he departs somewhat from the first clause of his description, and restricts both divine and human laws within the pale of mere morals, or of the *jus naturæ*; whereas jurisprudence has a more extensive import, since the laws both of God and man relate to actions neither right nor wrong under the law of nature; as, for example, the whole of what is strictly called divine *positive* law, and such human laws as are founded on civil policy only; those, for example, which inhibit the killing of game; the exportation of wool; inhumation in cotton vestments &c.*

No. 6. This definition of civil law, from the Institutes, is still more defective, as it is neither a definition nor a description. Justinian does not define law, either in the abstract or the concrete; but, taking it for granted that the import of the word is known, he merely says, 'That law which a people enacts for its own government, is called the civil law;' but no explanation is given of the import of the word '*law*,' and not a very satisfactory one of the word '*civil*.'

No. 7. Sir Henry Finch evidently designed to explain the meaning of the word law as a genus; but it is rather a description of the object of legislation, or of the duty of a lawgiver, than a definition of law itself. There appears, moreover, to be no propriety in defining a law or laws to be an *art*.

* Vide remarks on 20th definition.

No. 8. Bracton's definition was intended to apply only to a species, viz. civil law; but is not a just one even of that; since civil law does not restrict its commands and inhibitions to things merely honest and just, or the contrary. The word *sanctio*, which is generally rendered by the word *statute*, has a more comprehensive signification, and means order or command; so that this word *statute* is not obnoxious to the remarks made in considering the second definition.

No. 9. This cannot be regarded as any thing more than a definition of the law of nature, and not a very comprehensive one even of that species of law. I shall only observe here, that Puffendorf's leading objection to it appears to me untenable. He reproves it because Grotius thereby makes *right* antecedent to law, whereas Puffendorf himself considers all such right to be created by the law. I shall have occasion to consider this doctrine in the ensuing lecture.*

No. 10. The objection to this definition by Puffendorf is twofold; first; law in the *general* is not a *decree* or *statute*, for the reasons already suggested; secondly; if law in the concrete, or as a species, be a rule prescribed by some *superior*, the word *lawful* should be added; for no kind of superiority *per se* confers a power on any one to oblige others to obedience.

No. 11. The only material objection to this definition is, that if it be a definition of law in the abstract, it is not sufficiently comprehensive. The word 'subject' restricts it to *civil* laws only.

No. 12. Law in the abstract consists, no doubt, of *rules* of not acting, as well as of acting; since there are actions which may be forbidden, and others which may be commanded. Still, as verbal accuracy is essential to exact li-

* Vide post, 306 to 311.

imitation of ideas, we cannot define law to be *a rule* of acting or not [acting; for, as the learned Hooker justly observes, 'We must not suppose that there needeth one rule to know the good, and another to know the evil by: for he who knoweth what is straight, doth even thereby discern what is crooked.']*

No. 13. This definition of law in the abstract is very metaphysical and obscure. By the term 'working' is meant, we presume, *acting*. To every action belong a nature or '*kind*,' a power or '*force*,' a mode or '*form*' of doing, and a quantity or '*measure*' of doing; and according to this definition by Hooker, it is the province of law to assign to every thing in nature these limitations of their actions. But by whom, and for what object these limitations are assigned, or by what power they are enforced, and what are the general consequences of a departure from them, we are not informed. Hence, as a definition or description of law, it is far from being satisfactory.

No. 14. This is at most a definition of a civil law only, and not of the term Law. As such, it is objectionable in omitting the word *lawful* before the words 'sovereign power;' and also in the use of the word 'and' instead of *or*; because the same law cannot command one action and forbid another, as it would then be two laws. The same statute or ordinance may contain both; but not the same law.† And even if the same statute command the doing of an act, and forbid the doing of the contrary, it would be obnoxious to the objection stated in the remarks on the twelfth definition.

No. 15. Montesquieu commences his immortal work on the 'Spirit of Laws' with this definition of laws in the abstract. It is difficult to conceive in what respect a law is a *relation*, or a relation a law, though relations are always

* Hooker 11.

† Vide remarks on No. 2.

established by laws; or why these relations are necessary, and are said to result from the *nature* of things. Several points, doubtful perhaps, in physics and metaphysics, are assumed in this definition; and this, were it correct in other respects, would render it objectionable. A definition must be faulty which regards as a *principle* what is doubted or denied by many. But if this objection be waived, as far as it extends to mere physical and moral laws, yet the definition cannot extend to various other species of positive laws, and consequently cannot be received as an accurate definition of the *genus* law.

No. 16. This definition is rather awkwardly expressed. Law is not a rule prescribed 'in order to lay an obligation,' but is a rule whereby an obligation *is* laid. The word 'sovereign,' also, should have been preceded by the word *lawful*; since a rule is not a law, except in a popular sense, unless the superior be a lawful one. In the absence of this, his command is an act of usurpation, and an arbitrary mandate creative of no internal obligation. This definition is also framed expressly with a view to embrace *permissions* as laws. How far they are entitled to be so considered, will be examined presently. They certainly are not laws as to those who are at '*liberty to act or not, as they think proper*;' although, in regard to others, they are laws so far as that liberty or permissive right cannot be invaded by them.

No. 17. The observations made on the preceding definition apply equally to that of Barbeyrac.

No. 18. Mr Dagge, in his very able 'Considerations on Criminal Law,' confesses that he has bestowed due pains on his definition, and 'hopes that it will appear full and satisfactory.' He expressly states it to be a definition of law in the genus. But it is obvious that he limits it to the actions of intelligent beings only. Several objections, we think, might be made against it, even if physical laws

are properly excluded from the genus law.* He is fortunate, however, in being the first to introduce the word 'lawful' as an adjunct to the word 'superior.' But it is difficult to conceive how law is to be regarded as a '*faculty*.' Law, indeed, must emanate from a competent faculty, but can never be itself a 'faculty whereby some lawful superior prescribes *rules* of action;' for the law consists of these very rules, and not of the power or authority by which they are prescribed.

No. 19. This is a close approximation to a perfect definition of law as a genus. It would perhaps be better as a definition, and less of a description, were it paraphrased, with some additions to it, somewhat after the following manner. 'Law signifies the rules of animate and inanimate, of rational and irrational action, prescribed by some *lawful* superior, and which the inferior is bound to obey.' We have ventured to use the word *rules* instead of *a rule*, and the word *and* instead of *or*. The *actions* to which law is relative being extremely various, and the *entities* by which they are performed being almost equally so, the *genus* law comprehends rather an infinite variety of distinct rules, than a rule of different kinds. The substitution of this word seemed to impose the adoption also of 'and' instead of 'or.' I have likewise added the word *lawful* to the word 'superior,' not indeed for the reasons assigned by a late learned judge of our country, who objects to the word 'superior.' 'A superior!' says Judge Wilson, 'can there be no law without a superior? Is it essential to law that *inferiority* should be involved in the obligation to obey it?'† The brief reply to these questions is, that if 'consent alone can make a law binding,' which is admitted, still no feature of despotism is implied by this word 'superior;' for if the law be constituted by the community, that

* Vide post 301, where this point is considered.

† Wilson's works 65.

community is the superior, and the individual who is bound to obey, is the inferior. There is nothing odious in the term; it expresses nothing more than a truism, viz. that a whole is greater than a part. Again; if the law be made by the legislature, then the whole community, *quoad* the law, is the inferior, and the legislature is the superior. I have therefore added the word 'lawful' as an adjunct to the word 'superior,' for reasons previously assigned.*

No. 20. Few definitions have been so severely criticised as that of civil or municipal law by the great Commentator on the Laws of England. Scarcely a word in it has escaped the most critical examination; and were all the remarks collected to which it has given rise, they would form a considerable volume. This being a definition of a *class* of laws, and not of *a* law, is objectionable, as it seems to exclude one species properly embraced by that class, viz. Permissions. So, also, the clause 'commanding what is *right*, and prohibiting what is *wrong*,' is not sufficiently comprehensive. If the wrong or right alluded to, be referrible to the law itself, because commanded or forbidden, the definition would have been better without the clause; and, on the other hand, if they be referred to the *jus naturæ*, the definition falls short, as civil laws frequently, nay, generally relate to things indifferent to the law of nature.†

The words 'supreme power' have given rise to considerable reproof, and yet it is inconceivable how laws can spring from any other source. The objection is, that the Commentator has made legislative power necessarily identical with supreme power. Mr Tucker, in his annotations, denies this doctrine, alleging that the '*jura summa imperii*,' or supreme powers, do not necessarily appertain to the legislative body, but that in the American states

* Vide remarks on the 14th and 16th definitions.

† Vide remarks on the 5th definition; also Christian's note to 1 vol. Black. Comm. 44.

they reside exclusively in the people, who have delegated to their legislatures limited, and not supreme powers.* Mr Tucker's general views are certainly correct; but they do not, we think, fix the objection on the expression 'supreme power in a state,' since, as far as legislation is concerned, the legislature, as the constituted organ of legislation, must be the supreme power in every country, as far as the making of laws, within their constitutional powers, is concerned. Nor does this involve the absurdity of two supreme powers in the state, viz. the legislature and the people, since, *diverso intuitu*, they may both be supreme. In England, moreover, legislative power has its political, as well as moral or natural limitations; and legislative power, I presume, is no more *inherent* in parliament than in our own legislative bodies, though there may be a greater number of positive limitations on the powers of the latter than on those of the former. The theory of the British constitution is essentially the same as our own in this respect, viz. that all legislative power originally flows from the people. It is consequently not easy to perceive how it can be justly predicated that in the American states supreme power resides in the people, but in England in the legislature. In both countries it may be said that supreme power and legislative power are convertible terms.

Mr Tucker having argued this point with his usual ability, prefers Justinian's definition: 'Jus civile est quod sibi quisque populus constituit;' the word 'populus' referring to the source of the entire body of laws and institutions, from whatever authority derived; whether immediately from the people, or mediately through their legislature, or from long usage: whereas Justice Blackstone's definition, as explained by himself, refers them all to the legislature,

* 1 Tuck. Black. Comm. 46, 48, notes 4, 5. 52 note 9. 53 note 10, and appendix A.

all customs and unwritten laws being supposed to have sprung from *positive* legislation, the memorials of which have ceased to exist. That a Constitution is a law, we are not disposed to deny; but a constitution must be presumed to have originated from the people, before the legislature, in common with the other organs of the future government, went into operation. But after the government is constituted or organized, the legislature may be the supreme power in the state, though it be not omnipotent; unless the people should have reserved to themselves in all cases a constitutional veto, when they, in truth, would be the legislative power, and thus supreme in every sense. As to the customs and unwritten laws, they are not *per se* laws; they only become so when established as valid by the judicial power, which itself springs from the legislative power, or from the constitution. Neither in England nor in this country do the people make, nor can they make customs laws.

(5.) Proposed definitions. Having examined the foregoing definitions with some care, and stated with freedom such objections to them as we believe to be sound, it is natural to feel a hesitation in submitting our own views as to the proper definitions of law. We shall do so, however, without an attempt to vindicate them, as they ought to share the fate of others should they be obnoxious to any of the objections already suggested as to those commonly in use.

1. Law, in its most abstract and comprehensive signification, consists of that system of rules to which the intellectual and physical worlds are subjected; either by *God*, their creator and preserver; or by *man*, when invested with competent authority so to do; by which the existence, rest, motion and conduct of all created and uncreated entities are regulated, and on the due observance of which their identical being or happiness respectively depends.

2. A law (meaning any law) is likewise an abstract term, and signifies some rule of action regulating matter or mind, a created, or uncreated entity; ordained either by *God*, or *man* having authority so to do, by which the existence, rest, motion or conduct of such entities respectively is regulated, and on the due observance of which the identical existence or happiness of each depends.

3. 'The Law' (not meaning a single or definite law) is an expression that ordinarily excludes physical laws, and also those affecting other intelligences than man, in which sense, as an abstract term, it embraces, *first*, the totality of rules for the moral regulation of human economy, either national or individual, established by the universal Sovereign, and ascertained by his Revelations, by reason, conscience, or otherwise: *secondly*, those prescribed and promulgated by lawful human superiors for the government of men as citizens; and *lastly*, those ordained by the consent, express or implied, of sovereign states for the guidance of national conduct, and of international communion; to all of which rules those respectively to whom they are directed, are obliged to make their several actions conformable.

4. Civil or Municipal Law signifies those rules of civil conduct which are prescribed and promulgated by the lawfully constituted supreme power of a state; some commanding what shall be done; some designating what shall not be done; and others pointing out what may be done or omitted at the election of those to whom they are respectively directed; all of which rules are obligatory, and are enforced by sanctions, express or implied.

5. A civil or municipal law is a particular or single rule of civil conduct, prescribed and promulgated by the lawful supreme power of a state; commanding something that shall be done, designating something that shall not be done, or pointing out something that may be done or omitted at the election of those respectively to whom it

is directed; which rule is obligatory on them, and is enforced by some sanction, expressed or implied.

(6.) Properties of Law, how divided. In treating the properties of Law, they may be considered as *internal* and *external*. Those which are implied *ex vi termini* are internal or inherent properties of a law; such as that it be a *rule*; that it emanate from a *lawful superior*; that it create an *obligation*; that it involve a *sanction*, &c. The external properties are those which respect its *utilities*, or the motives for its enactment; the *objects* which are to be affected by it, &c.; as, for example, that its object be a possible and reasonable one; that it be of a legal nature; that its prohibitions be not needlessly multiplied; and finally, all those external considerations which constitute the philosophy of legislation.

In the following remarks on the properties of law, I shall not use that term in its most extended sense, but only as applicable to intelligent and responsible beings, and as creative of an obligation flowing from law in the popular sense of that word. Every rule indeed from which any entity whatever cannot, will not, or ought not to deviate, is a law; and this embraces not only physical rules, but counsel, advice, a transient order, a promise, a covenant or compact; all of which create obligations, and, in one sense, are so many laws. But laws, in their more restricted meaning, the properties of which I am about to consider, do not ordinarily embrace any of these.

(7.) Of the Internal or Inherent properties of Law. *First. Law is a rule.* 1. This term is said to indicate the *universality* and *perpetuity* of a law, thereby distinguishing it from a transient order made by a lawful superior, and from a *sentence*, which concerns a particular person only. It is said that an act of the legislature to confiscate the goods of Titius, or to attain him of treason, is not a law, but a sentence only that Titius, in consequence of having vio-

lated some existing law, has subjected himself to a legislative declaration, sentence or decision, by which the penalty of the violated law is merely ascertained and enforced; and that the act is not properly a statute nor law, nor done in the exercise of legislative power. But an act of the legislature, though it concern but few persons, or a single one only, is still a law, the above doctrine applying only to a *quasi* judicial sentence, pronounced by a body which ordinarily concerns itself only in legislation. Thus an act of the legislature which enables an infant or a feme covert to convey lands; which divorces A from B; which gives validity to a defective conveyance, &c. is as much a law as one which forbids universally the exportation of corn. 2. Law is said to be a *rule* to distinguish it from counsel or advice, which, though it may be a means of bringing conviction to the mind, cannot *per se* create an obligation. Advice is optional, law is imperative; the language of the former is that of *persuasion*; that of the latter is a declaration of the lawgiver's *will*.^{*} Counsel offers reasons with a view to create obligation; law acts directly, and presumes that reason coincides with power.† 3. It is said to be a *rule* to distinguish it from a compact or covenant. Among the democratic nations of antiquity, nothing was more usual than to speak of laws as compacts or covenants; this idea entered into their very definitions of law; and sometimes affected even the *formulae* of mak-

^{*}Puff. N. N. book 1, chap. vi. sec. 1. Hobbes De Cive. cap. 14, sec. 1.

† 'Law does not *teach*, but commands what is to be done.' This is the language of Lycurgus, among the most ancient of lawgivers. Law and reason have much to do with one another; but the former does not cease to be obligatory by being either unreasonable or inconvenient, if it be not *malum in se*. Hence it is aptly said by the civilians, that the 'currency of the law is not to be disputed, though time had in a great measure worn down the image, and damaged the superscription.' I shall have occasion to remark on this doctrine hereafter.

ing their laws; or perhaps these *formulæ* gave rise to the idea of laws being strictly compacts. Laws being sometimes made in the form of a Stipulation and Acceptance by the people, were called agreements. But even when made in this mode, they are not compacts, this being nothing more than the manner in which the supreme power indicates its will. That power was in the majority of the people; but when the law was promulgated, it obliged not only the majority, but the minority also. In all cases, the original authority to make laws, be it vested in whom it may, must have flowed from consent or agreement; and even if this original act had been by the unanimous consent of the members of the community, it would not follow that the laws subsequently made by that power, are to be regarded as compacts. In all compacts, the obligation is of our own direct and express creation. Their language is, 'I agree to do or not to do, to possess or not to possess;' whereas that of law is, 'Thou shalt or shalt not do; thou shalt or shalt not possess.'*

Secondly. Law is a rule of *action*. In the restricted sense in which we now use the word law, action comprehends only the *moral* and *civil* conduct of man. The former is regulated by the laws of God and of nature; the latter is the peculiar object of human legislation. But moral conduct is sometimes the subject of civil laws, as where they restrain luxury, inebriety, religious creeds &c. These in their effects often operate prejudicially on others, and do not terminate in the *person* of the agent, and in such cases become the proper object of the civil law. Vices which are purely *private* have seldom been meddled with by positive legislation; the difficulty has been to ascertain the exact limits which separate the one class from

* Arist. Rhet. book 1. cap. 1, 2, 15. Dion. Halic. lib. 10. Taylor's Civ. Law, 153. 1 Black. Com. 45.

the other. Superstition and arbitrary power have too often confounded them; and though Demosthenes has eloquently said that 'laws are the morals of the state,' they become the most odious tyranny when they invade the sanctity of private opinion, and presume to dictate even rules for the palate; as Zaleucus did when he restricted, under the penalty of death, the use of pure wine to the sick, and to them only when the physician's certificate could be obtained.

Thirdly. Law is a rule of action *prescribed* and *promulgated*. It is obligatory only on those who know the fact of its existence, and therefore must be promulgated. It imports a definite order, and must therefore be plainly prescribed, that it may be understood.

Natural law is inscribed on the heart of man 'by the finger of God;' and is promulgated or ascertained from divine revelation, the light of reason, conscience, sentiment &c.*

Human laws should not only be *prescribed* in clear and unambiguous language, but be efficiently *promulgated*, or conveyed to the knowledge of those on whom they are to operate. We have seen that Hobbes considers both so essential to the just notion of law, that he has made them a part of his definition of that term. By the former is not meant that laws should be written out, as the word 'prescribe' would seem to import; but merely that they be conveyed in language as free from ambiguity as possible, be it verbal, written or printed. In regard to the promulgation of laws, justice demands that they be made known before they become obligatory. The liberty and property of the citizen may indeed be placed in peril by the vague and unintelligible language of the laws; but much more would this be the case were laws permitted to operate

* Vide post 313, 319, where the various theories as to the ascertainment of the dictates of the *Jus Naturæ*, are considered.

without due promulgation; and still greater would be the jeopardy of all that is dear to man, were *actions innocent when done*, and *rights vested agreeably to existing laws*, made penal or void by laws subsequently enacted. It is consequently a principle of universal jurisprudence, that laws, *civil* or *criminal*, must be *prospective*, and cannot have a *retroactive* operation. And though the Constitution of the United States,* in its prohibition of *ex post facto* laws, has been construed to extend only to *criminal* laws, yet this is only declaratory of a principle sanctioned no less by the common law of England, than by universal law; and the same principle enables the courts to disregard *civil* laws of this description, as equally inoperative, though not within the letter or spirit of the particular clause restrictive of *ex post facto* laws.†

Although there are English authorities which recognize the injustice and invalidity of *express* retrospective legislation, and also the propriety of a *formal* promulgation of laws before they become effective; yet it is a received doctrine in that country, that laws which operate in that manner by *implication* of law, and of which there has been no such promulgation, are nevertheless valid. Before the introduction of printing into England, the statutes of each

* Art. 1. sec. 9, 10.

† Bracton lib. 4, fol. 228. Digest 50, 17, 75. Code 1, 14, 7. Taylor's Civil Law, 168. Bacon's Abridgment, 6 vol. 370. Statute (C.) 2 Institute 292. 1 Black. Com. 46. Coke Litt. 360. Gilmer v. Shuter, 2 Modern Rep. 310. Bacon De Augm. Scient. lib. 8 cap. 3. Puff. N. & N. book 1, ch. 6. sec. 6. 4 Burrow's Rep. 2460. 2 Shower's Rep. 17. Calder v. Bull, 3 Dallas' Rep. 386. Ogden v. Blackledge, 2 Cranch's Rep. 272. Wilkinson v. Myer, 2 Lord Raymond's Rep. 1352. Ham v. McClaws, 1 Bay's South Car. Rep. 93. Osborne v. Hager, *same*, 179. Bowman v. Middleton, *same*, 252. Dash v. Van Kleeck. T. Johnson's N. York Rep. 477. Society v. Wheeler, 2 Gallison's Rep. 103. Dartmouth College v. Woodward, 4 Wheaton's Rep. 518. 2 Coke's Institute, 526. 4 Inst. 25. 1 Plowden's Comm. 79. 1 Levinz' Rep. 91, 6 Brown's Parlia. Cases, 553. Latless v. Holmes, 4 Durnf. & East's Rep. 660.

session of parliament were usually sent to the sheriffs of the counties, and proclaimed by them publicly. This practice, however, ceased in the time of Richard II. Some statutes are appointed to be read in their churches and other public places; and they are often printed in their newspapers, and in other forms; but the English law has not provided any general mode of promulgating laws, nor, indeed, was promulgation of any kind ever deemed essential, even when the sheriffs &c. were required to proclaim them. Strange as it may seem, every statute, until very recently, was obligatory from the first day of the session of that parliament in which it was made, unless a particular time for its commencement were fixed by the statute. This rule was based on the refined notions, *first*, that every subject is, in *judgment of law*, a party to the making thereof, by his representatives;* and *secondly*, that the whole session must be regarded as but one day, for which, however, no reason has been assigned even as good as the forced one first mentioned. The mischief and absurdity of this doctrine having become too manifest for endurance, were considerably mitigated by the statute 33 George III. c. 13, which provides that when no time is fixed, statutes shall commence their operation from the day on which they receive the royal assent. This statute, however, only lessened the period in which legislation could operate retrospectively; but as important rights and innocent actions intervening between the day of the royal assent and the actual promulgation of the law, are affected by the law; and, moreover, as statutes need no promulgation at all; the doctrine, as it now stands, is at variance with natural justice, and the principles of universal jurisprudence. Promulgation however, though legally essential, would not require that actual knowledge of the law should be brought

* 1 Black. Com. 178. 3 Reeves' Hist. Eng. Law 147. 6 Bacons' Abr. 369.
Bentham's Fragment on Gov. xxvii.

home to the individual to be affected by it. All that is ever meant by the promulgation of a law is, that it shall be duly made, and in such a manner that it *may* reach those on whom it is designed to operate; for when the ordinary means of promulgation have been used, every one is presumed to be cognizant of the law; according to the maxim, '*ignorantia juris non excusat.*'*

The English doctrine in regard to promulgation has been adopted in this country; and though at variance with the clearest principles of justice, it is perhaps too firmly established by judicial decisions to be shaken, and can only be remedied by some adequate legislative provisions. Or, in cases of peculiar hardship, it lays the foundation for a claim on the justice of the legislature to refund what is exacted under such a prospective law, and to indemnify those who are prejudiced by it. If an act of congress be silent as to the date of its operation, it commences from the passing of the act, even though it be a penal one; and it operates on all rights and actions then existing, though the law were not only unknown, but *impossible* to be known by those to whom it is directed.† But in Patten's case‡

* Although the laws of Rome were said to be made *populi jussu*, yet promulgation was deemed essential, since they generally proceeded *ex auctoritate senatus*; and all *edicts* &c. were duly published. How different this from the odious conduct of Caligula, who is said to have written his laws in such small letters, and fixed them on such high places, that it was impossible they should be read. The *Senatus-Consultum Marcianum*, which was discovered at Naples in the year 1640, was engraved on a brazen plate, and contained the following provision. 'It is further ordered by this decree, that these presents be published for three successive market days, in your common assemblies, to the intent that you may well understand the pleasure of the Roman senate; and it is likewise ordered that you engrave this decree upon a brazen tablet, and that you cause it to be hung up where it can be most easily read;' a provision, the spirit of which should guide the legislative councils of England and this country, in neither of which does the doctrine of promulgation seem to form an essential part of jurisprudence.

† The Brig Ann. 1 Gallison's Rep. 62.

‡ 1 Danc's Abridg. 587, s. 10.

the court held that an act of congress which had laid an additional duty 'from and after the passage of the act,' excluded the day of its passage.

Fourthly. The next inherent property of law to be considered, is *sanction*. The terms sanction, motive, obligation and punishment being intimately connected in the legal notion of a law, have often been strangely confounded, and have given rise to much casuistical and metaphysical discussion. When attentively considered, however, they will be found to convey very distinct ideas, as may be made obvious perhaps without much subtile inquiry.

Man, as an intelligent being and a free agent, is guided in all his actions by reason, or what he takes to be such. He is operated upon by motives; and they all lead him to seek pleasure, and to avoid pain. These are the *final* causes of every obligation to which man is, or conceives himself to be subjected. *Sanctions* are the *prospective* pains or pleasures that lead men to act, or to refuse to act; they are the sources of obligation, and though properly distinguishable from *motives*, they only differ from them as a *causa causans* does from a *causa causata*. It is usual to divide *sanctions* into four classes, in reference to the principal sources of pleasure and pain; these are called *physical, moral, religious* and *legal*, a brief explanation of which may be necessary.

1. *Physical Sanction* is some prospective corporal evil or bodily suffering, the usual result of violating the laws of our physical constitution.

2. *Moral Sanction* is the violence that will be done to our conscience, moral sensibility, or regard for virtue; the ordinary result of our violating the dictates of right reason, the moral sense, or whatever may be the source of our knowledge of right and wrong.

3. *Religious Sanction* is some evil in this or the life to come, which we believe will be consequent upon the commission or omission of certain actions (if not repented of) forbidden by the law of God.

4. *Legal Sanction* is some threatened evil, whether corporal or mental, made expressly consequent on the neglect of some *positive* requisition of a human legislator.

There appears, however, to be another source of pleasure and pain, not comprehended within the just notion of either of the preceding sanctions, and that is the value we place on the estimation of our friends and the world at large. The moral sanction seems to embrace only matters of *conscience*; but there are matters of honour, fame, reputation, vanity &c. which actuate extensively our conduct, and yet affect in no degree our conscience. Hence, we think, there should be a distinctive name for that sanction which leads us to covet the good will of those around us, and of men generally; and this may be denominated the *social sanction*. Those philosophers who refer every act to some selfish principle, speak of selfish obligations, and consequently of selfish sanctions; but this, we apprehend, is manifestly incorrect, as they resolve all others into this, and therefore a distinctive name is unnecessary.

To illustrate the operation of these several kinds of sanction, we may contemplate the situation of a man of refined sensibility, religious and moral principles, regardless of health, beloved by wife, children and friends, and possessed of ample means to enable him fully to enjoy every blessing. By one of those fatalities to which the best of men are sometimes subject, he becomes intemperate, loses his nice sensibilities, is regardless of religious motives, forfeits the love and esteem of those around him, and with them his health and property. He is subjected to an *interdict* under the law which declares confirmed sots *non sui juris*, and subjects them to solitary confine-

ment. In that deplorable condition his thoughts are directed inward; reflection at one view presents to him the pleasures he has forfeited, and the pains, present and future, that are consequent on his vice. The *physical* sanction admonishes him that persistence in his infirmity must terminate in death. The *moral* and *social* sanctions bid him remember the charms of friendship, the bliss of conjugal life, the value of reputation, the glory of his former fame; all of which may not be irretrievably gone. The *religious* sanction adds its powerful appeal, thunders its dreadful comminations, and whispers its inviting promises. Lastly, the *legal* sanction presents the horrors of a prison, secluding him from every thing but his own agonizing feelings. The complete operation of these punitive and remunerative sanctions ends in a confirmed sense of *obligation*, and with that his vice is forever abandoned.

Sanctions may be called the *threatened* evils, and *promised* goods of the law; they operate as *motives* productive of *obligation*, or the state of being bound; and when disregarded, are followed by *punishments*, which are nothing more than the *executed sanctions* of the law. Sanction, motive, obligation and punishment are correlative terms; and as the first of these may be divided into five classes, the others, in like manner, may be distinguished as physical, moral, social, religious and legal. The avowed object of human laws is to operate by the civil or legal sanction; but this is by no means the full extent of their operation in fact, or of the sound theory on the subject. Nor do the divine and natural laws enforce obedience solely through the religious and moral sanctions. Laws, human and divine, may have *express* sanctions, and yet be operative mainly in virtue of other sanctions. A civil law, for example, which prohibits adultery under the penalty of a heavy mulct, is greatly aided by the

moral, religious and social sanctions, especially by the latter. The human prohibition is merely declaratory of natural and divine law, and cumulative of their sanctions. The same remarks apply to actions forbidden by the divine and natural law, but which are not cognizable under any civil law; in which case the *social* unites with the moral and religious sanctions to prevent their commission. In regard to offences purely legal, usually denominated *mala prohibita*, and which are purely indifferent under the *jus naturæ*, it has been questioned whether they bind the conscience at all. On this point Mr Justice Blackstone has expressed, we think, an unsound, and certainly a very unsalutary doctrine.

The opinion of the learned commentator is, that they have no concern whatever with the conscience, and that such laws merely offer to the subject the alternative of obedience to the law, or submission to its penalties.* I am not disposed to enter into this controversy, especially as it has been so ably refuted by Mr Sedgwick in his *Critical Remarks on the Commentaries*;† and also by Judge Tucker in one of his learned annotations.‡

Compliance with law not being optional, sanction of some kind, express or implied, must be an essential ingredient in every law. Even when the motive which prompts to obedience is wholly remunerative, as is sometimes the case with a law, the proffered reward may be justly considered as a sanction, since the loss of a possible gain, which is consequent on disobedience, may considerably affect the state or happiness of those who disregard the law; and, on the other hand, may operate as a powerful inducement with others to respect it. This, however, does not seem to justify the idea of Bishop Cumberland,§ that all laws

* 1 Black. Com. 57.

† Sedgw. Cri. Rem. 52 to 64.

‡ 1 Tucker's Black. 58.

§ De Leg. Nat. Proleg. sec. 14 and cap. 5, sec. 40.

may be considered as sustained rather by remunerative than punitory sanctions. He supposes that even where death is the penalty of a law, our life is preserved to us by obedience, and that we respect the law rather from the love of life, and for the preservation of a good, than from the desire of escaping the evil of death; and so in all other cases, respect for the laws secures to the compliant its appropriate reward. The brief reply to this doctrine is, that by a remunerative sanction we mean some good or reward directly consequent on obedience to a law, and which is purchased, as it were, by such compliance; and not the retention of any good previously our own, and of which we are merely permitted the continued enjoyment if we respect the behests of the law. So essential to the just notion of a law is sanction, that the civilians generally would not admit the possibility of law's subsisting without one. Hence was it that *Leges* were often called by them *sanctæ*; not from any presumed sanctity inherent in laws, but because they are made binding by the *penalty* that awaits their infraction. *Proprie dicimus sancta quæ neque sacra neque profana sunt, sed sanctione quâdam confirmata; ut leges sanctæ sunt.** And it is a principle of the common law of England, that where a law has omitted to declare any sanction, the courts are authorized, in the exercise of a sound or legal discretion, to punish the offender, usually by fine and imprisonment. In the Roman and other codes, instances are stated of laws in which no sanction is expressed; and a few in which scarcely any can be implied. These are called imperfect laws. *Inter leges quoque illa imperfecta esse dicitur, in quâ nulla deviantibus pœna sancitur.†* Thus the *Lex Cicinia* annexed no other sanction than that its violator *should be held to have done wickedly*. But Puffendorf, on the authority of

* Dig. 1. 5. 2. 3.

† Macrob. in Somn. Scipi. c. 11. c. 17.

Tacitus and Cicero, is of opinion that the Censors possessed the power to enforce the law by some substantive punishment; and if not, that the infamy consequent upon disobedience, was of itself a penal sanction.* The same remark applies to the Valerian law, which merely declared that its violation should be deemed a *wicked act*. Livy observes on this, 'I suppose it was judged of sufficient strength to enforce obedience to the law in those days; so powerful was then men's sense of shame: at present one would scarcely make use of such a threat seriously, even on any ordinary occasion.'† Of the same description are various laws mentioned by Diodorus Siculus, which are remarked on by Puffendorf and others; such as that of Zaleucus, 'Let the citizen who prosecutes his enemy with implacable violence, be deemed a man of a *barbarous disposition*;' and other ancient laws, as, 'Let no free woman, *unless she be drunk*, be attended by more than one maid.' 'Let no man wear a gold ring, or be clad with splendour, unless he has been *guilty of adultery*.' These were certainly effectual means of guarding against the evils of luxury, and were probably the most powerful sanctions that could have been justly annexed to such laws.

Fifthly. We are now to inquire into the nature of Obligation, a property inherent in every law, and essential to its existence. Not that laws invariably insist on the actual execution or omission of the things commanded or forbidden; on the contrary, they generally insist merely on the alternative of obedience, or of submission to their sanctions.

The term obligation has given rise to much cunning learning, and refined casuistical discussion. The true definition of the term; its various *kinds*, as internal, external, perfect, imperfect; its *species*, as religious, moral, phy-

* Tacit. Ann. book XIII. Cicero de Leg. lib. 2, cap. 9. Puff. L. N. N. lib. 1. cap. vi. sec. xiv.

† Baker's Livy, book 10. chap. ix.

sical, civil, social &c; the true theory of its source or origin; how it is distinguished from *motive*, how from *sanction*; on what it is *founded*; how it differs from *compulsion*; whether there be *degrees* of obligation, &c; are topics that have engaged the attention of philosophers from the days of Plato and Aristotle, to those of Stewart and Cogan. It is far from my design to enter at large on any of these mooted questions; it is sufficient that the student be apprised of them, and that we present to him some of the more useful results in which these discussions have terminated, together with the leading sources of information on all these points.

The word obligation is often used in a popular sense as synonymous with motive; thus we say, 'the obligations are strong,' meaning thereby that the motives or inducements to do or to omit an act, are strong. But obligation, in its metaphysical and true sense, admits of no degrees nor divisions; it is a *state*, in which a free agent is placed after a judgment is formed by him, on all the motives that are presented to his mind on either side of the point to which the obligation relates. Obligation, therefore, being an effect, a judgment or conclusion of reason, admits of neither degrees nor divisions. An inducement or motive, on the other hand, is a mere cause. It is any thing which contributes to the production or prevention of an action, and is therefore infinitely various in its nature and degrees. Sanction differs from obligation as cause does from effect: an obligation is a tie, a sanction is a motive productive of that tie; the latter serves to bind, the former is the state of being bound. The source of obligation, or the reason why a free agent is morally bound in any case, has been a question of much supposed difficulty. The theories on the subject are numerous, and, like most others, are generally obnoxious to the objection, that they repose on some single and pervading principle as the fountain of all obligation;

in like manner as the power of moral discrimination has been referred by various philosophers to some single and independent source, instead of being referred to most of them combined, or to all of them. So various have these theories been, that Lord Kaimes jocosely remarks that an account of them would be a 'delicate historical morsel;' and Mr Bentham amuses himself at their expense by enumerating the phrases that characterize the several systems, and briefly commenting on each, in such a manner as to place in high relief their refined absurdities.*

A man is said to be *obliged* to abstain from injustice of any kind, when the motive or motives which gain the ascendancy over any counter motive or motives, are accompanied by a conviction that it is, on the whole, better for him to proceed according to the rule prescribed to him, than to disregard it.

But whence these motives proceed, how they are ascertained, and why they are obligatory, constitute the difficulty so long inquired into. By some philosophers it is said that we are bound in all cases by the 'Moral Sense;' others say by 'Common Sense;' by the 'Eternal Fitness' of things; by the 'Understanding;' by the 'Rule of Right;' by the 'Love of Truth;' by 'Utility;' by the 'Law of Nature;' by the 'Will of God;' by 'Instinct;' by 'Internal Sensations;' by the 'Inductive Principle;' by 'Self-Interest;' by 'Benevolence;' by 'Love towards God;' by 'Gratitude' for former favours received; by 'Inspiration;' by reason of being one of the 'Elect;' by a 'Sentiment of Obligation,' &c. &c.†

* Bentham's Prin. of Mor. and Legis. xiii.

† Cogan's Ethical Questions, 341 to 410. Ellis' Dissertation on Obligation. Burlamaqui's Institutes, N. Law. Part i. ch. vi. sec. ix. ch. viii. sec. xi. Paley's Mor. and Pol. Philo. book 2. Puff. book 1, ch. vi. sec. v. vi. Good's Book of Nature, vol. 2, lec. vi. 3 Reid's Inqui. ch. vi. vii. viii. Beattie on Truth, part 1, ch. iii. lec. vii. Stewart's Essays, p 123. 2 Rutherford's Insti. 219, sec. 3, 4, 5. Ruth Essay on Virtue, ch. vii.

Notwithstanding the mass of learned and subtile inquiry which marks the progress of the questions concerning the source of obligation, I cannot persuade myself that they are attended by that intrinsic difficulty which justifies the labour bestowed on them. It appears to me that the *rationale* of all that is really useful in the inquiry must be built on a few undeniable postulates, which may perhaps be stated as follows.

1. That some things are, by a law of man's nature, preferable to others.

2. That among these, happiness is preferable to misery; and so of the degrees of each.

3. That man is so constituted by nature as to pursue happiness, or what he conceives to be such, in preference to misery; and so of the degrees of each.

4. That God has endued man with reason, conscience, instinct; and has added to these revelation; and man, by means of them all, has gained knowledge or experience; through the instrumentality of the whole of which he is enabled to ascertain with a certainty equivalent to demonstration, the things which contribute to happiness, or lead to misery; and so of the degrees of each.

5. That when these several means, (and in some cases less than all) are brought to operate on any question of duty, a judgment is eventually formed, accompanied by a conviction that, if this judgment be disregarded, he merits, or certainly will suffer, some evil greater in amount than any which can flow from compliance with the judgment.

6. That the operations of the human mind, (in many cases the result of habit) are sometimes inconceivably rapid; giving to the conviction of obligation the appearance of intuition, moral sense, instinctive sentiment, &c.

The definitions of obligation have been as various as the explanations of its origin. I shall not refer to any of them, but endeavour to define the word in two ways, either of

which, it is hoped, will sufficiently indicate my general views as to its nature origin and kinds.

1. Obligation is a duty imposed on a responsible being by the judgment or conviction of his own mind, ascertained by the means of reason, conscience, instinct, revelation or experience; the person being affected by a selfish, social or religious impulse or motive, (or by some or all of them united;) and by the due observance of which he knows or believes that his happiness is in some degree to be affected: or—

2. Obligation is the state of being bound, of which an intelligent and free agent is conscious; in which he believes that a defined thing, enjoined or forbidden by a known and competent power, must be done or avoided by him in order to escape some prospective evil consequent on disobedience; and which, in his estimation, is greater than any that can arise from obedience.

Obligations are said to be internal, external, perfect and imperfect.

I am inclined to think that all obligation is, properly speaking, internal; for if the reason and conscience be in no way implicated, it is mere *compulsion*, or physical necessity. So, also, all obligation, correctly speaking, is perfect; at least as to the person affected by the obligation. But as these terms have a popular and useful signification, it is proper to remark that by an *internal* obligation is meant one that is mainly produced by reason and conscience; and by *external* obligation is generally meant that which is created merely by the will of a human legislator.

Having explained sufficiently the nature of this important property of laws, there remains a subject connected with it, which has puzzled nearly all who have treated of the morals and philosophy of jurisprudence; I allude to the question, whether *Permissions* are to be regarded as

laws. It appears to me, however, that neither the utility nor the difficulty of the question merited the thought bestowed on it. What I have to say on it, therefore, will be as brief as the point will admit.

There can be no question that the word 'permission' imports, *ex vi termini*, nothing beyond a mere option in him who enjoys the permission; and that every feature of obligation is necessarily excluded as to him. It is equally clear that, if a permission be a right of any kind in him who may claim its benefit, all others are bound to leave him in its undisturbed possession, and consequently that, as to such third persons, there is a law obliging them to respect the permission claimed by another. But this does not solve the difficulty, nor is it by any means to be admitted that the law which prevents such persons from interfering with the permission, will give to permissions themselves the character of laws as to any persons whatever. It is presumed that every conceivable permission may be classed under one or the other of the following heads.

1. Where a permission arises from the mere silence of the law; that is, from the absence of all legislation on the subject.

2. Where it flows from the circumstance that an affirmative or negative law has failed to enumerate the case claimed as a permission; this non-enumerated case may be called a permission by *implication* of law.

3. Where certain persons or things are *expressly* exempted from the operation of a law.

4. Where a law grants an express permission, called a privilege, to some particular person or persons; and prohibits others from interfering with such permission or privilege.

In all the foregoing cases, he who may claim the benefit of the permission, is not *obliged* so to do; whereas

all others are obliged to abstain from interrupting the person claiming the exercise of the permission. Still it cannot be correctly predicated of *permissions* that *they* oblige, or operate as laws on any one. For though others are bound to respect them, they are bound, not by any part or quality of the permission, but in virtue of a distinct law; and though the prohibition be contained in the same *statute*, it is as distinct from the permission itself as if contained in another statute. The whole question, then, appears to resolve itself into a mere point of verbal accuracy, and though much nice and nearly incomprehensible learning has been displayed on the point, I am unable to perceive that any other positions can be extracted from it than, *first*, that all permissions must necessarily be attended either by an express or an implied law, inhibiting others from violating them; and *secondly*, that permissions themselves can never be laws, either as to those who claim their benefit, or as to others who would interfere with their exercise. This view of the subject, so natural in itself, appears, as far as I know, to have escaped the attention of those who have written so extensively on the subject.*

(8.) Of the Ex- I am now to examine the *external* properties of properties of law, so far at least as will enable the student to comprehend the general outline of a subject which embraces nearly the entire philosophy of legislation; and which is consequently quite too extensive to admit of any thing more than a statement of its prominent features.

No science is more recondite, no art more complex and difficult, than that of sound legislation. It demands an in-

* Ellis' Roman Law, 19 to 22, 111, 192, 281. 1 Campbell's Grotius, 14. *in notis*. Burlam. Inst. 100. 1 Ruther. Inst. N. L. 16 to 22. Puff. N. L. book 1, ch. vi. sec. xv. Grotius de jure, B. ac P. lib. 1. cap. 1. sec. ix. and note 5. 2 Beattie's Mor. Sci. 118. Taylor's Civil Law, 47. 48. Digest 13. 7.

timate acquaintance, not only with the moral and physical nature of man, but a thorough knowledge of the adseitious character of those in particular for whom the laws are to be provided. A code of jurisprudence entirely adapted to advance the happiness and prosperity of a nation, would be the greatest effort of human skill and wisdom. That laws may promote the general prosperity with as little sacrifice of individual good as possible; that they may enlarge the intelligence and wealth of the community, with a strict regard to its morals; that they may maintain perfect subordination, without oppressive and trivial restrictions; and that they may regulate private conduct, without invading the sanctity of private opinion, and binding to modes of faith; have been at all times, and in all countries, the great *desiderata* of enlightened legislators, philosophers and statesmen. Mr Bentham, in his work entitled 'An Introduction to the Principles of Morals and Legislation,' has entered largely into this very interesting topic, in a manner, indeed, very peculiar, and a little too eccentric for a work so grave and didactic. Mr Bentham, with a view of presenting a general idea of the nature and extent of the subject, has stated in his preface what he conceives to be the proper topics and divisions of a complete code, or Treatise on the Jurisprudence adapted to the wants of a nation; his own work being mere *prolegomena* to a more extensive one, with which he designed to favour the publick. That the student may have a like notion of the subject, according to the views which I entertain on it, I shall avail myself of Mr Bentham's divisions in part, not adopting, however, his order, or his exact phraseology; and I shall also add considerably to his divisions, so as to supply what occur to me as important omissions in his arrangement.

The Principles and Objects of Legislation may be applied to the following matters; which, if formed into

definitions, maxims, declarations, laws &c. with that caution which wise heads, cultivated minds, and virtuous hearts might bestow, could not fail to constitute a code of jurisprudence which, if not perfect, might at least enable nations, in time, to make their own nearly so.

The divisions of the Code may relate to

I. A clear and definite Terminology of the entire proposed system of jurisprudence.

II. To matters establishing the Political State, or Constitutional Laws.

III. To matters establishing the Constitutional Procedure, or the means of conducting business in all the political assemblies of the State, so as to attain, in the most *orderly* and *efficient* manner, the end of their institution; the whole of which is embraced under the name of Political Tactics.

IV. To matters promotive of Private Morals.

V. To matters promotive of Religion in general.

VI. To matters declarative and preventive of Crimes *mala in se*, through the medium of penal sanctions.

VII. To matters pointing out, and preventive of Offences *mala prohibita*, through the medium of penal sanctions.

VIII. To matters promotive of obedience to laws, through the medium of remunerative sanctions.

IX. To matters regulating Criminal Procedure, from its inception to its complete termination.

X. To matters of Civil or distributive justice in regard to property in things *corporeal*, whether moveable or immoveable; and to the voluntary and involuntary acquisition and disposal thereof.

* It is proper here to apprise the student that, under the English and American law, the distinction between things *corporeal* and *incorporeal* is not founded (as it is in nature) on the tangible and visible quality of the one, and the mere notional or mental existence of the other. Thus land, money, houses, ships are in reality corporeal; sovereignty, the right under a covenant or promise, a right of way, &c. are incorporeal. This is the

XI. To matters of Civil or distributive justice in regard to property in things *incorporeal*, whether affecting moveable or immoveable things; and to the voluntary and involuntary acquisition and disposal thereof.

XII. To matters regulating Civil Procedure, from its inception to its complete termination, as far as it respects things corporeal, moveable and immoveable.

XIII. To matters regulating Civil Procedure, from its inception to its complete termination, as far as it respects things incorporeal, moveable and immoveable.

XIV. To matters of Civil distributive justice in relation to things *extra patrimonium*, but in which there may still be enjoyed valuable rights; as in the Ocean, Air, Public Rivers, Liberty, Reputation &c. &c. and which do not come within the terms of any just definition of property.*

XV. To matters of Finance and Publick Expenditure.

XVI. To matters regulating the communion between the Nation and other States and Nations.

A philosophical legislator will have respect to a variety of rules which have been ascertained by the experience of ages, or by the *à priori* reasonings of the wise and reflecting of various nations. These constitute the science of legislation, and come under the head of the external properties of law; some of the more important of which are as follows.

1. Laws should be of a *legal* nature.

The violations of this rule are to be found in some sumptuary laws; in those relating to mere private ethics; and in

distinction made by the Roman law, and pervades all the codes built on that system. The English law, on the other hand, ranks land, houses and other unmoveable property as corporeal; but furniture, money, ships, cattle, and such like moveables, are classed neither with corporeals nor incorporeals.

* Property may perhaps be defined an *exclusive* right to some *external* thing, corporeal or incorporeal, moveable or immoveable.

a great number of frivolous regulations to be found in the jurisprudence of most countries; such as the law that the Ephori should wear beards; that the groom and his bride should eat a quince together; that on the emancipation of slaves, small bundles of hay should be thrown over them, &c.

2. Laws should have a possible, reasonable and useful object.

This rule needs no comment; the first and second parts of it are obvious; the third means that general utility should characterize all laws, and not mere individual good.

3. Laws should not be needlessly multiplied, but be as few in number as the genius of the government, and the state of society will admit.

This was a very favourite maxim with many ancient legislators. As the rule is expressed, there appears to be no sound objection to it; but it is generally so worded as to convey the idea that a paucity of laws is a positive good, and the reverse, a necessary evil. If the first and second rules be observed, the sound doctrine then would be, 'the more law the more liberty,' and legislation could hardly be too minute. The learned Harrington, however, appears to be very unfriendly to numerous laws. 'Rome was best governed,' says he, 'under those of the twelve tables; and according to Tacitus, *plurimæ leges, corruptissima re-publica*. But you will be told that when the laws are few, they leave much to arbitrary power: but where there be many, they leave more: the *laws* in this case, as Justinian and the best lawyers think, are as litigious as the *suitors*. Solon made but few laws; Lycurgus fewer; and commonwealths have the fewest, at this day, of all governments.'* This view of the subject however, is, we think, more plausible than sound.

* Oceana, 56. System of Politics, chap. ix.

4. Laws should speak a general language, and not attempt to comprehend all possible cases.

As a general rule, this is very sound; no enumeration of the objects of the law can be sufficiently comprehensive to embrace all the cases that may fall within its spirit; and, consequently, enumeration should not be attempted beyond what may be necessary fully to exemplify and illustrate the law. The more minute is the specification, the stronger is the reason for supposing the legislator intended to exclude all non-enumerated cases. Laws, however, are sometimes very minute in their enumeration, and still conclude with general words, so as to embrace all cases within its spirit.

5. Laws should not only be general in their phraseology, but universal in their operation.

This rule is also to be received with some caution. Wise legislators will, indeed, guard against granting *privileges* except for very special reasons, and will endeavour to follow Solon's rule, which was, to make no law that did not comprehend all his subjects indifferently.

6. Laws should be grounded on some fact which has happened, with a view to the prevention of its recurrence; for if none such has occurred, and is not likely to occur, it is not wise to make a law to meet its possible contingency.

This rule, it appears to me, is rather fanciful than solid. It may be sound as to penal laws against crimes of a very odious nature. Hence, Solon justified the omission in his code, of a law against parricide.

7. Laws should never attempt to secure their continuance independently of the power in which they originated. In this case the maxim must ever be, *unumquodque dissolvitur eo modo quo colligatur*.

All legislative or supreme power must be co-equal, and none is competent to bind itself, much less others to a fixed observance of laws. The right of repeal and modification is

inherent and unalienable. In modern times, however, as well as in ancient, the devices have been numerous whereby the legislature would impose restraints on itself and on other legislators, with a view of placing laws beyond the reach of the power whence they emanated. These are deemed no less unwise than idle, and indeed impracticable.

8. Laws should have respect to the moral and physical nature of man in general, and more especially to the particular character of those to whom they are directed.

9. Laws should vary with the great and radical changes in the genius and disposition of the people, brought about by the gradual developement of the energies of a nation.

10. Laws should not be venerated merely for their antiquity. A wholesome jealousy of innovation, and respect for existing laws, are nevertheless to be encouraged.

The three last mentioned rules need not be commented on at this time, as I shall have occasion to allude to them in the ensuing lecture.

LECTURE VIII.

OF THE LAWS OF NATURE APPLIED TO MAN INDIVIDUALLY, WHETHER IN A STATE OF NATURE, OR OF SOCIETY AND GOVERNMENT.

(1.) Introductory In the preceding lectures we have generally been contented with stating some of the most useful and approved notions of the Law of Nature, without tediously dwelling on the many subtle questions with which the casuists have embarrassed the topicks of its origin, nature and sanctions.

In the present lecture we shall advert to most of these points, not with the view of discussing them with metaphysical minuteness, but of endeavouring to combine, in as small a compass as may be consistent with perspicuity, all that is really valuable in these long vexed questions. These controversial ethicks, if not intrinsically as valuable as many of the learned jurists of former times supposed, have still proved highly beneficial; as it may happen that those who are in search of precious ore, may gain more by repeatedly turning up, and thereby enriching, the sterile soil in which it may be hidden, than by the discovery of what they seek. The zealous student of these topicks will find much to awaken attention, much that will fashion his mind to close and abstract reasoning, and discipline it to severe and patient investigation; and it is certain that those most distinguished in the science of ethicks, and of natural and

international law, have addicted themselves to these nice and abstract disquisitions. Writers on these subjects are indeed, at this day, more systematick, less metaphysical, less pedantically learned on most points, than Grotius and Puffendorf, Cumberland, Wolfius, and many others; but it by no means follows that their works have superseded the writings of these great fathers of the law of nature and nations. The successors of the erudite Grotius, and the metaphysical Puffendorf and Cumberland, have enriched themselves by a careful study of the writings of these very learned men, and have been enabled to clothe their own productions in more attractive attire. But, after all, it must be confessed that no modern treatises on ethical jurisprudence, and the principles of international law, can compare in solid usefulness with the elaborate works of the philosophers we have just named.

The science of International Law, as distinguished from what has been called the necessary and eternal law of nations, which indeed, in one sense, is rather ethicks than law, is almost wholly of modern structure. The treatise '*De Jure Belli ac Pacis*' was the first attempt at pointing out the delicate lines which separate the laws of nature from the customary, voluntary and conventional laws of nations. This work of the immortal Grotius is far more expository, and consequently more authoritative, than those of his predecessors; and it is a little remarkable that, after so admired an example, his distinguished successor, Puffendorf, should have relapsed into all those extremely refined ethical disquisitions which confound the morals of the schoolmen with the positive, diplomatic and natural laws and institutions of nations.

In some of the preceding lectures I have spoken of man in a state of nature; of the rights of nature; and incidentally of the laws of nature. In the present lecture it is my purpose to state more at large the nature, origin, and

general principles of that great code which explains and defines the reciprocal rights and obligations of men and of nations.

(2.) Definitions of The definitions of the law of nature the law of nature. have been extremely various. We shall state some of these in substance, though not in their language, as the former will sufficiently instruct you in the opinions of the various writers.

Burlamaqui, a sensible author, speaks of the laws of nature as consisting of those rules which nature alone prescribes to man, with a view to his true and enduring happiness. These rules, as a system, are imposed by God on man, and constitute the science called the law of nature and of nations, embracing the fundamental principles of moral philosophy, universal jurisprudence, and general politicks.

Puffendorf speaks of this law as that universal rule of human actions, to which every man is obliged to conform, as he is a reasonable creature.* Rutherford says that the laws of nature are those rules of moral conduct which mankind, in their intercourse with each other, are obliged to observe, from their very nature and constitution.† The eloquent Sir James Mackintosh, from whose language we are never inclined unnecessarily to depart, says, in substance, that the law of nature and nations teaches the duties and rights of individuals and of states; the former embracing private ethicks, as far as they can be reduced to fixed and general rules; and the latter, those general principles of politics and international law, which the wisdom of the lawgiver adapts to the peculiar situation of his country, and which the skill of statesmen applies to the more fluctuating circumstances which affect its welfare and safety.‡

* Puff. book 2, ch. 3, sec. 1. † 1 Ruth Inst. 1, 22. ‡ Mack. Intro. 3, 4.

Montesquieu, who has but a word on the extensive subject of the *Jus Naturæ*, remarks, that 'prior to all laws, are those of nature, so called because they derive their force entirely from our frame and being. In order to have a perfect knowledge of these laws, we must consider man before the establishment of society: the laws received in such a state, would be the laws of nature.'*

The law of nature, says Mr Dagge, is the 'faculty' that dictates those moral duties which every intelligent being is obliged to observe, under an unknown penalty for transgressing the presumed will of that Supreme Being from whom he derives his rational powers.† Grotius defines this law to be the dictate of right reason, whereby any action, from its conformity to, or disagreement with the nature of man, is either morally good or bad; and, as such, is either enjoined or prohibited by God, the author and preserver of nature. Lord Coke, in alluding to this great system of rational and immutable law, says that it is that which God, at the 'time of the creation of man, infused into his heart, for his preservation and direction; which is *lex æterna*, the eternal law, the moral law, called also the law of nature; and by this law, written with the finger of God on the heart of man, were the people of God a long time governed, before that law was written by Moses, who was the first writer of law in the world.‡ Most of the foregoing definitions, or rather explanations, are liable to objection, as indeed is the case with most others which might be mentioned. Some of these rather explain the operation of this law, than its essential nature: others, again, rather disclose the medium of its communication to man, than its qualities or its origin; and some of them rest on the assumption that there are actions essentially right or wrong, independently of all law. The definitions of Grotius and Burlamaqui

* Sp. of Laws, bk. 1, ch. 2.

† Dagge's Crim. Law, 82.

‡ 7 Coke, Calvin's case, 25.

are the least objectionable, as they show the universality of this law, that is, that it applies to all reasonable beings; the author of the law, viz. God, who alone was competent to bind all men by one rule of action; and, lastly, the only mode in which this law is ascertained, viz. through the human heart and understanding. since, independently of all revelation and divine positive law, the conscience and reason of man are alone sufficient to discover every dictate of the law of nature. The expression, 'laws of nature,' has been often applied to matter as well as to mind; but the foregoing definitions very properly confine the subject of these laws to the moral conduct of man; for the expression, 'physical laws,' is more suitable to the laws which regulate matter, and thus distinguishes between those two great systems of rules, the one applicable to mind, the other to mere matter.

Law indeed, in its most comprehensive sense, may be extended to other entities than moral agents; and we have so defined it in the preceding lecture. Still, however, when we come to speak of any particular system of laws, we should have an appropriate expression. Thus the term, 'natural law,' should not be applied both to the conduct of moral agents, and the rules prescribed by Deity in regard to matter. Both systems are natural indeed; but the expression, 'physical laws,' when applied to matter, not only prevents confusion, but keeps asunder things which are essentially different. We cannot, however, concur with Mr Christian, when he would wholly exclude the use of the word law, as applied to matter. The difficulty of which he complains, may, we apprehend, be removed in the manner just suggested. No confusion can result from applying the general word, law, to both moral and physical actions and entities; but there is, as before mentioned, an impropriety in permitting the same expression, 'natural law,' to apply to moral actions, and also those principles which re-

gulate the existence, and various mutations of matter. Mr Christian was, no doubt, impressed with this impropriety, but has gone unnecessarily far in restricting the word 'law' to the actions of man as a moral agent. This sense of the word, says Mr Christian, 'is perhaps the only one in which it can be strictly used; for in all cases where it is not applied to human conduct, it may be considered as a metaphor. We say, indeed, that it is a law of motion that a body put in motion *in vacuo*, must for ever go forward in a straight line, with the same velocity; but we might as well have used the word property or quality.' He further adds, that 'when law is applied to any other object than man, it ceases to contain two of its essential ingredient ideas, viz. disobedience and punishment.'*

The difference between us is scarcely worthy of further remark. We know, however, that the material universe is regulated by defined and fixed laws or rules, on the observance of which its perfection, and, in many instances, its existence depend: these are the primeval laws prescribed by Deity. Every rule thus prescribed to matter, whether it relates to its existence, motion, rest, or various transformations, must be observed; otherwise, the *res subjecta* ceases to exist, or it assumes some other form than the one originally designed. These rules of matter, we know, are not invariably adhered to, and the consequence is, that Deity has as invariably impressed on such departure, imperfection, decay, and perhaps ruin, as he has unhappiness, punishment or death on man, when he violates the moral laws of his nature. All physical laws have their peculiar sanctions, which, though they may not be called punishments, are as fatal to the harmony and perfection of the world of matter, as are the correspondent penal sanctions to the world of mind, or of moral intelligence: both systems

* 1 Chris. Black. Comment.

of rules must be observed with equal strictness. These rules are consequently laws, not indeed of the same species, but belonging to the *genus* law; and these rules, when denominated laws, are not, we think, so called in a metaphorical sense only. But it is unnecessary to insist longer on a question of terms.

(3.) Whether the law of nature be common to Man and Brute, and how far it is common to God and Man. From what has been said we at once see the impropriety of extending, (as some have had the pedantry to do) this law of nature to brutes.

When the Roman lawyers defined the law of nature to be that law which nature teaches to all living creatures,—*Jus naturale est, quod natura omnia animalia docuit; nam jus istud non humani generis proprium est, sed omnium animalium quæ in cælo, quæ in mari, nascuntur,**—they intended to describe something very different from that *lex naturæ* with which treatises on ethics and jurisprudence have to do. The definition of Ulpian answers only to those instincts which are common to man and brute, and yet which operate very differently on the two, being modified in man by the voice of conscience, or the moral sense, and by reason, or, perhaps, by the reasoning faculty only. But Puffendorf thinks that the general consent of the learned has discarded the notion of this common law of animate beings, as it is impossible to conceive how a creature should be capable of such law, and yet incapable of reasoning.† What is done by brutes, therefore, in common with man, is done by them out of simple inclination, that is, from instinctive impulses; but by man, with a sense of obligation or of right super-added; and hence arise moral sanction and accountability. It is, we suppose, from a confusion of the very distinct meanings comprehended in this phrase, that this absurd

* Dig. 1, 1, 3; Inst. lib. 1, Tit. 2. sec. 1. † Puff. book 2, ch. 3, sec. 2.

notion arose, of beasts being subject to the law of nature; a notion which its friends have endeavoured to support from some passages of scripture,* and which Puffendorf has been at some pains, unnecessarily we think, to confute. Lord Bolingbroke, who had no affection for the Holy Scriptures, and still less for Rabbinical learning, contends from these various passages, that the Jews made beasts accountable like moral agents; and that the Mosaic history and law sustain the opinion, that the law of nature is common to man and beast; and he concludes with remarking that he 'knows nothing more absurd than this, except a custom at Athens, but which was less cruel than that of the Jews, viz. that the weapons by which a murder had been committed, were brought into court, as if they too were liable to punishment; and the statue which had killed a man by its fall, was, by a solemn sentence of that wise people the Thasii, cast into the sea!'[†] In reply to these sarcastic remarks, it is sufficient to observe that, if the scriptures of the Jews be construed with the same critical justice as the laws and customs of other countries are, the passages relied on, and now referred to, do not necessarily sustain the interpretation given to them by these critics. No one will seriously contend that the Thasii supposed that the statue had committed any crime, or that it was conscious of any punishment in being cast into the sea. So, likewise, the law of deodands, so prevalent in most countries, and even, at the present day, in some of the American states, has never been supposed by any one to be based on the idea that the chattel which had occasioned death, was forfeited to the state on account of any fault or responsibility in itself. And yet it would be as just to accuse the Thasians and the people of this country, to whom the law of deodands is not unknown in practice, of believing that inert matter

* Gen. 9, 5; Levit. 18, 23, and 20, 15, 16; Deut. 13, 15, 16; Exod. 21, 28.

† 7 vol. Bolingb. Works, 375; Taylor's Civil Law, 116.

is morally accountable, as to impute to the Jews a belief that the beast which had killed a man, and had been stoned to death, was thus dealt with as a punishment to it. The truth is, that all these laws and customs grow out of some peculiar reasons of policy, wholly referrible to their moral influence on man; and have no regard whatever to any supposed moral effect either on brutes or inert matter. Philo-Judæus, Maimonides, Puffendorf, Taylor, the learned Selden, and many others, who have perhaps spent too much time and research on this point, agree that the sole object of these laws and institutions was to create a greater abhorrence of crime in all its forms, and a more lively respect for human life; hence, that the brute which had killed a man, was not deprived of life *ad pœnam ab illâ exigendam*, but *ad pœnam exigendam à domino*; and in the case of bestiality, lest, among other reasons, 'the beast remaining alive, should keep up the scandalous remembrance of the human offender who had suffered punishment.' These, and numerous other reasons would have sufficiently weighed with Lord Bolingbroke, had he been inclined to extend to the Mosaic and Jewish institutions, that same measure of liberal explanation, which he so well knew how to accord in all other cases.*

*Vide Selden *De Jure naturali et Gentium, juxta disciplinam Ebræorum*, lib. 1, cap. 5. Selden, whom Grotius calls the 'glory of England,' and who is always quoted under the name of the learned Selden, was born in 1581. He was not only an accomplished lawyer, but a ripe scholar, as is manifested by many works of wonderful research, of which the following are the principal. The 'Analecton Anglo-Britannicon,' 'England's Epinomis,' 'Jani Anglorum Facies Altera,' 'Titles of Honour,' 'De Diis Syris,' 'History of Tithes,' 'Marmora Arundeliana,' 'De Successionibus in bona defuncti ad leges Ebræorum,' 'De successione in Pontificatum Ebræorum,' 'Mare Clausum, seu Dominio Maris,' 'Eutychiei Ægyptii Origines Ecclesiæ,' 'Uxor Ebraica,' 'De Anno Civili Veteris Ecclesiæ,' 'De Synedriis Veterum Ebræorum,' and 'Vindiciæ de Scriptione Maris Clausi.' He is also advantageously known by his annotation on 'Fleta,' and the work entitled 'Table Talk,' which was a collection of his sayings made by a friend, and published af-

Another curious topick of inquiry among casuistical jurisprudents is, how far the law of nature can be considered as common to God and his creature, man; a question which, in one shape or other, in religion as well as in natural law, has not been without considerable discussion. The main difficulty involved in this point, seems to be this. One party places the fountain of all natural law in the divine will alone, which, according to their system, may ordain or abrogate this law at pleasure. In this system, God is conceived to be bound by no laws of his own, inasmuch as he can thus change them in fact by any volition, however contrary to the present moral arrangement of things. The other party contends for a natural, eternal and immutable fitness or decorum of things, which they say must be essentially consonant to, and binding on a being of purity and goodness, and from which there is not a possibility that he should ever depart. That if we ever conceive him capable of enjoining rapine, murder, and a dishonest life, we must conceive him, at the same time, willing into existence a being quite opposite to that which he has created; and having created man as he is, it is of necessity that he wills the rules which we at present take to be the laws of nature. Hence they deduce a kind of obligation on God to observe his own laws; and in this sense they say that the law of nature is common to God and man. This party is sub-divided into two classes, the first denying the power of Deity over these laws, the other seeming to admit the original power, but with the modification that, having established the law, he is obliged to observe it, and

ter his death. We have noted the writings of this learned man, that students may see how a well directed and persevering industry, not only mastered the science of English jurisprudence, but all the minute learning of the institutions, laws and customs of the Jews, which chiefly lay hid in the ponderous, and forbidding volumes of the Rabbinical writers. But his learning was still more various, as is seen in his notes on the Arundelian marbles, his *Analecton* and *Epinomis*.

cannot abrogate it. The first class contend for the immutability of the law of nature, because, as they say, it is so founded in the essential holiness and justice of God, as to represent a perfect image or copy of these attributes, and must therefore be as eternal as they. The second class contend, that although God is the author of natural law, yet having, in his pleasure, created man, with whose nature that law agrees, the latter becomes therefore obligatory on God. Whether there is much utility in this inquiry, we will not say. Our object, however, is only to state the point, and some of the views which have at different times been entertained concerning it; not to enter at large into the question, or seek to clear it of the difficulties which environ it.

In several of the preceding lectures we leaned towards the opinion, that there is in man an innate admiration of virtue and truth, independently of any immediate reference to their convenience to the purposes and happiness of life. With that idea may very naturally be connected another, viz. that we should feel within ourselves an impulse, which might be termed obligation, towards the practice of virtue, and the discovery of its consequent happiness, without any hope of reward, or fear of punishment. This we call an internal obligation, in contradistinction to that which is external, and which is derived from our holding the laws of nature not only to be approved by God, but sanctioned by him with penalties, either in this life or a future. The internal obligation would lead us, if not by a necessary law, certainly by a principle of our nature, to love this virtue and this truth; whilst the external obligation would make us fear to violate them. Now, let us pursue this subject of internal and external obligation, and see what connexion it has with the point under consideration. The law of nature, we remember, is said to be a body of rules convenient to human conduct, and enforced by the

God of nature by penalties; for whatever may be the notion of some as to the natural fitness of things being a source of obligation, a penalty is declared by all writers to be an essential quality in all laws addressed to moral agents. If we then assume this idea of law, it cannot be predicated of it that it is common to God and man; since we can, with no propriety or decency, suppose him to be operated on by any thing in the nature of an external obligation, or penalty. God, therefore, must be independent of all external obligation. But the question yet remains, is he independent likewise of all internal obligation? Can he, by a mere volition, change all the rules of duty which now subsist, and command ill for good, injustice for equity, hatred for benevolence? for all this seems to be implied in the notion of those who contend that all natural law originates merely in the Divine will, independently of any natural fitness of things, and any absolute and essential conformity of natural law to the very nature and essence of Deity. We may avoid, if we choose, to pronounce God under a necessity to observe the rules which arise out of the proportions and harmonies of that great moral system of which he is the originator and supreme head. This, however, would be nothing more than a change of phraseology; for this doctrine is no impeachment of his omnipotence, and predicates nothing more than that he is under a necessity of conforming to his own essential nature, whatever that is: and the law of nature being presumed to be a system in perfect coincidence with that nature, we assert, by the immutability of that law, nothing more than the immutability of the essential attributes of Deity. We do not perceive how the conclusion is to be avoided, to which we are driven by the consideration of God's perfect wisdom and goodness, that he must, in all cases, will that which is true, just and honest, and cannot will the contrary. We say what is true, just and honest, and these,

we are inclined to think, are so, not merely because he has willed them, but because they are so in themselves, these being coeternal and coefficient with his own nature, and, as such, prescribed to man for his observance. In this sense, then, the law of nature may be said to be common to the creator and the creature. While we, from the imperfectness of our nature, are allured to the obedience of this great law by the hope of reward, or by the fear of pain, He, from the perfectness of his nature, is necessarily determined to the enactment and to the observance of all the laws of the moral system of the universe.

The question, when stated in a different form, is essentially the same, viz. whether, independently of all law, divine, natural and human, any action can be regarded as intrinsically good or evil. It is certainly a topick of extreme delicacy, approached by all with great diffidence, and on which we pretend not to shed any light, as it has baffled the efforts of the ablest metaphysicians of all ages. The writers on either side of the question, have not agreed in their views, and scarcely with themselves. The affirmative has been maintained by Cudworth, Clarke, Grotius, and many others; whilst the negative has been espoused with equal zeal and learning, by a still more numerous class of philosophers, as Descartes, Puffendorf, Bolingbroke &c. Cudworth may be regarded as among the most distinguished champions of the doctrine of an eternal and immutable morality, independent of the will of Deity. It is said that he has dealt with the intellectual world as some of the ancient philosophers did with matter, when they maintained that the Demiurgus, or divine Architect, moulded the frame of the world out of eternal or primordial particles of matter, having a wholly independent existence. So Cudworth imagined a sort of intellectual chaos of independent, eternal ideas, in which God sees truly, and man endeavours to see, the real essences of things. In this view of the learned

author, the essences or foundations of morality have a higher source than Deity itself, and exist prior to the existence of any moral agent, and independent of the will of him who has created all moral agents.* Descartes, on the other hand, thinks that, though the essences of things, (by which he means their possible modes of existence, in contradistinction to actual existences) are eternal and immutable, yet they are not independent of God; that they are immutable and eternal, merely because God has so willed it; and that immutability is not inconsistent with dependence, because the perfect conformity of these to the nature of God's universe would render them immutable, though they are dependent on the will of him who is the author of that universe. Cudworth has found great fault with this distinction, and rejects the idea that God is the author of these essences as well as actual existences. He supposes the former to be eternal, and wholly independent of God; and hence, that moral and other truths have an independent existence, prior to the entities to which they are relative; and, consequently, that the moral or natural law is independent of God, and common to God and man. But Descartes is by some supposed to have meant to apply his doctrine only to such truths and essences as relate to created beings, and not to such as relate to the nature of Deity himself; for that truths which relate to him, must be as eternal and immutable as himself, and wholly independent on his will, since it would imply a contradiction to suppose that his omnipotence demanded the power to change his own nature. Whether this were his idea or not, we incline to think it the sound doctrine. The law of nature therefore, as it respects man, may be changed by him who created man; but the immutability of the essences and truths which relate to Deity himself, does not bind Deity by any

* 7 Boling. Works, 280.

obligation or law, nor does it in any degree impair his omnipotence, since it implies, in truth, nothing more than what all theists and christians place as the very foundation of their religion, viz. that 'with God there is no variableness nor shadow of turning.' But we must part with this subject, which is perhaps quite too abstract for the occasion, and which should not have been thus alluded to, had not our scheme of instruction, in this first title of the course, aimed at pointing at least to every material doctrine of ethical, as well as of mere positive or civil jurisprudence.

(4.) Difference between the Law of Nature, and Divine Positive Law.

The great rules or principles whereby God is pleased to conduct the moral system of things, and which are known under the name of the laws of nature, are obviously somewhat different from that revealed law which he hath given to the whole human family, or to the Jews in particular, and which is denominated Divine Positive Law. This revealed code may be said to consist of two branches, viz. the Moral Law, and the Ceremonial Law. The difference between the *jus naturæ*, and the revealed law, is clear enough, if we consider what makes the original distinction between moral, and mere positive duties. If the Law of Moses, for example, forbids murder, and the eating of unclean animals, what, it may be asked, makes the first a moral, and the second a positive precept? To say that the one is a precept of the law of nature, and the other is not, only carries us back to our first difficulty, viz. what is it that makes them different? They are not established by a different authority, for God commands them both; nor are they under different sanctions, because happiness is the reward of obedience in both cases; and it is the same also under the Mosaic law and the Gospel. Neither do we gain any thing by saying, that every moral duty becomes a positive one when God is pleased to declare such a moral duty by any express command; for the obligations which flow from the law of nature, when clearly ascer-

tained by the light of reason and conscience, are the same as those which are imposed by divine positive law. The true difference, we apprehend, is this: under God's universal moral system, actions are either good, bad or indifferent; the two first we are obliged to do or to avoid, because they of themselves, as we perceive by the mere light of nature, invariably produce either good or evil, and we therefore, by the natural law alone, are under an obligation to follow or to eschew them. But if God hath been pleased to enjoin any thing which by the law of nature is indifferent; this indifferent matter then acquires a distinct character, and we are under an obligation to perform it; not that the Almighty can be conceived to enjoin any thing to no purpose, but because we instantly conclude that he hath some important and beneficial aim, correspondent with the general designs of the law of nature. Thus again, for example; the natural law permits us to labour on all days indifferently; yet God hath now enjoined on all men the observance of the Sabbath, designing thereby to preserve that lively veneration of him, and remembrance of his worship, which are enjoined by the law of nature, but which are more effectually promoted by this excellent positive ordinance. From what has been said, it appears that the natural and divine law are not to be distinguished from each other by any thing which relates to actions *bona aut mala in se*; but by this only, viz. that positive or revealed law has made actions, indifferent in themselves under the natural law, assume a new character by reason of injunctions and prohibitions annexed to them, which were wholly unknown to the natural law. It is true that a great portion of what is called divine positive law, relates to matters intrinsically good or evil: but that branch of the scriptures called the moral law, is nothing more than the natural law more clearly revealed to us, for the purpose of confirming the natural dictates of reason and conscience; and the inter-

nal obligation is not said to be increased, since the injunctions of the natural law, when ascertained by the light of nature, are equally obligatory with those which are repeated in the scriptures. The obligation of divine positive law is said to be both internal and external; the former, because man's reason promptly assures him that Deity is incapable of enforcing that which on the whole is not productive of good; and the latter, because the whole scriptural system has revealed to us that punishment shall surely be visited on all who violate any of its injunctions.

Divine positive law is distinguished from the law of nature chiefly by two circumstances; first, the mode of its communication to man, and secondly, that it is alterable by the authority which made it; whereas the *præcepta naturæ* are eternal and immutable, being founded in the essential nature of Deity himself.*

As to the first, viz. the means of arriving at the knowledge of the law of nature, various opinions have been entertained in all ages, and in all countries. Most of these are, no doubt, extremely absurd, being the offspring of Rabbinical superstition, of scholastic refinement, or of metaphysical pedantry. A brief notice of these theories is all that we can allow ourselves, and all, indeed, that is necessary.

First. The Talmudists assert that God delivered orally to Adam, and subsequently to Noah and his sons, the whole of the law of nature, embraced in seven short and energetic precepts, now of universal obligation. They regarded this little code as the *matrix* of the entire body of moral or natural law, 'primordiale legem, et matricem omnium præceptorum Dei.' They also held that although these precepts, (now that they are revealed, and have become traditional among all nations and people,) are perfectly consentaneous to the human understanding, yet a revela-

* Vide ante sec. 3.

tion was essential, and that these elements could never have been brought to light by the unaided reason of man.*

These boasted 'Præcepta Noachidarum,' as they are called, do not justify the praises bestowed on them by the Jewish Rabbis. They enjoin the worship of one God, and that a murderer shall forfeit his life; they inhibit idolatry, incest, murder, theft, and the eating of animal food, unless cleansed of its blood. That human reason could have ascertained the necessity of all of these, except the last, we cannot doubt: but if not, these can scarcely be said to furnish the fundamental rules of ethics and natural law; and the ample commentaries of the Jewish doctors, or even the elaborate annotations of modern Christian philosophers, if restricted to these precepts, would furnish a meagre code, compared with what we now call the system of natural jurisprudence. It must be admitted that the Mishna, and its commentary, the Gemara, even as pruned, and purified of most of its absurdities, by Maimonides, in the twelfth century, are no very authoritative source either of unexceptionable morals, or of pure reasoning. From this brief account of this famous *matrix legis naturæ*, it is not probable that this theory as to the origin and promulgation of the natural law, will gain many adherents, more especially as the purer pages of Holy Writ give no countenance to this traditional figment.

Secondly. Another mode, according to the Jewish doctors, by which man came to a knowledge of the laws of nature, was by inspiration, partly of superintendency, and partly of actual suggestion. Some of the Rabbins, on the supposition that man was wholly unable of himself to arrive at these important truths, and that the oral communication of the laws of nature, as just stated, may not have taken place, assert that at one period the Schekinah, or

* Selden. de Jure Nat. et Gent. lib. 1 ca. 10. I Jennings' Jew: Antiqu. 116.

illuminating presence of the Deity, was so strong in the minds of some of the patriarchs, that they became acquainted, not only with the principles of the laws of nature, but with those of universal science. During this period, these pious fathers also consulted Deity through their high priest, and the minds of the prophets were so enlightened by the superintendent inspiration of Deity, that these great truths became familiar to them, and were transmitted by the scriptures, and by tradition, to all ages and countries. It is further stated by them, that the fulness of the Divine presence withdrew itself in after ages; but still that the Jewish nation was under a more special protection than other nations, and that important truths continued to be communicated through a mediate, or more remote inspiration. It appears, then, that the seven precepts, according to the first theory, were not imparted by any species of inspiration, but by an express oral communication; whereas, according to this second mode, the knowledge was gained either by an inspiration which aided human reason, (and which modern theologians call an inspiration by superintendency) or by a direct inspiration, in defined ideas, and exact language, as to matters above human reason; which the same theologians denominate inspiration of suggestion. As to this theory we have only to remark, that the fullest faith in our holy religion does not require us to believe that the principles of morals are above the reach of human reason, and must have remained unknown if not revealed by inspiration of some kind. We therefore dismiss this hypothesis as entitled to no more regard than that of the seven precepts said to be given to the Noachidæ.

Thirdly. The next opinion on this subject, which has been greatly disputed, but to which we can only allude, is that all our knowledge of morals and the natural law is derived to us solely from human reason, which invariably

pronounces a judgment in all cases of moral approbation and disapprobation; and that not only the entire code of morals and natural law flows from, and through the channels of, the reasoning faculty, but that none of its rules derive even an additional certainty, or obligatory force, from any other source. The advocates of this doctrine say that on some points the judgments of reason are pronounced with such wonderful rapidity, as to assume the appearance rather of an instinctive sentiment, or moral sense, than of sure conclusions attained by any ratiocinative process; while on other matters, the mind arrives at its conclusions by a regular chain of argument and induction. Those who maintain this doctrine, are not content with the admission that the rules of morals, and the laws of nature, are strictly conformable to reason, but they hold, as we have said, that there is no other means of arriving at the knowledge of any of them than by reason, and that there is no other faculty of the mind which in any degree co-operates with it. They contend, in fine, that all moral distinctions are not only as demonstrable as mathematical truths, but that no other means are requisite for their full effect as well as ascertainment, than the reasoning faculty: That all sense of obligation to obey them, and all that we call moral approbation and disapprobation, proceed wholly from reason: That this approbation or disapprobation differs in no respect from the judgment which reason, in its general operation, pronounces in all other cases: That however strong may be our admiration or disgust of certain actions, the mind is in such cases merely affected with a thorough sense of truth, derived to it by the reasoning faculty: And that this judgment of approbation or disapprobation is attended by degrees of pleasure or pain, only as reason is more or less clear in arriving at its conclusions.

Fourthly. Closely allied to the foregoing theory, is that which allows to reason its full share in the ascertainment of

moral distinctions, but, at the same time, claims for SENTIMENT an active influence in producing on the mind that thorough conviction of truth which affects the heart also, and pronounces certain actions good, and worthy of being practised, and others bad, and to be carefully avoided. This hypothesis maintains that in every case of moral discrimination, two distinct faculties are called into requisition, viz. reason and sentiment; and that virtue and vice naturally and essentially affect the human mind differently, it being in the very constitution of man to love virtue, and to abhor vice, which are made known to him by the united operation of reason and sentiment. Hence, says Mr Hume, 'I am apt to suspect that reason and sentiment concur in almost all moral determinations and conclusions. The final sentence, it is probable, which pronounces characters and actions amiable or odious, praiseworthy or blameable; that which stamps on them the mark of honour or infamy, approbation or censure; that which renders morality an active principle, and constitutes virtue our happiness, and vice our misery: It is probable that this final sentence depends on some internal sense or feeling, which nature has made universal in the whole species.'*

From this view of the subject, it appears to be the province of reason to ascertain from all the circumstances of a given case, the various tendencies of the actions involved in it; while sentiment, by a law of our nature, necessarily and feelingly distinguishes the moral from the bad; the good from the evil; the useful from the prejudicial; giving activity to the judgment, and enabling reason more effectually to accomplish its work. This hypothesis does not allow to reason alone the power, in any case, to define the merit or demerit of an action; sentiment must participate, independently of all volition; and this gives us pain or

* Hume's Essays, vol. 2, 210.

pleasure at the contemplation of vice or virtue, proportioned to the perfection of our moral structure, which may be much affected by our moral, intellectual, and perhaps physical education. There can be little if any cause to doubt, that this theory is nearer the truth than that which ascribes our knowledge of the laws of nature to reason alone, or to sentiment alone, as some have maintained.

Fifthly. The next opinion we shall note, is that of Hobbes, who, so far from admitting the law of nature to be the law of God, ascertained either by his express communication, by inspiration, reason or sentiment &c. contends that this law becomes known to us, and obligatory, only when enacted by the laws of man; that the civil magistrate is the sole organ whereby this knowledge is obtained, and its obligations created! This theory makes the origin of natural law wholly independent of God; while some of the others we have just mentioned, make it wholly independent of the human mind and heart.

It is indeed wonderful to what lengths a fondness of theory often carries the mind, and how many absurdities even learned men are capable of, and almost conceal from themselves, by the use of novel or unmeaning words. Hobbes, pressed by the powerful claims of right reason, is compelled to admit that this is the rule, while he denies that it is the law of human conduct. The judgments of reason, as they are stated in the writings of the soundest ethical philosophers, and the opinions of individuals, as they are sanctioned by reason, by conscience, sentiment &c. are not, in his opinion, authoritative: they do not amount to laws, *ob defectum auctoritatis summæ!* All actions he believes to be wholly indifferent, until the civil magistrate makes a difference by commanding some, and inhibiting others; his pervading and magical maxim being *Non veritas, sed auctoritas facit legem.*

But whatever may be the source of communication of the natural law, all now agree that it is clearly distinguished from divine positive law, as to the mode by which it is ascertained, and also in its unchangeable nature;—on both of which we have dwelt perhaps sufficiently long.

(5.) Whether this law is derived from the consent of mankind. Besides the two leading opinions already stated, which refer the origin of the law of nature, the one to the Divine will alone, the other to a natural decorum and fitness in the things enjoined or prohibited; there are several other doctrines connected with this subject, which deserve our special notice.

We shall now examine a hypothesis usually ascribed to Aristotle, which seeks for the source of this law in the consent of mankind, or, at least, of the majority of what are called the most refined and enlightened nations. If by this is really meant, that we may appeal to the concurrent testimony of enlightened man for the doctrines of natural jurisprudence, we do not perceive how this can be denied, though a contrary doctrine has been ably maintained by Mr Ward, in his *Inquiry into the Foundation and History of the Law of Nations*, as we shall presently have occasion to show.

The opinion of mankind at large on any subject, is the only natural standard by which the probable truth of the matter is to be judged. It certainly raises a strong presumption in favour of a doctrine, when many men of different nations concur in it; but this may not be decisive. Nor is this standard at all shaken by the fact, that the moral opinions and practices of some nations and tribes have been extremely variant from, and even opposite, on many essential points, to what are deemed sound morals in Christian or polished communities. Neither does this doctrine of the natural standard, which was the opinion of many philosophers, from Aristotle down, suffer from the conces-

sion that even some enlightened and refined nations have entertained sentiments, and exhibited manners, wholly in hostility to our scheme of morals. Nor, lastly, is it affected by the admission that the simple excel the wise in number, and that if the actual practices of men are indicative of their notions of right or wrong, vice and dishonest arts would seem to be more congenial to the nature of man, than what we denominate decorum and virtue. All these may be conceded for the sake of argument, and yet human opinion may not be impugned as the standard of moral discrimination.

It is to be observed in the first place, that the opinions of nations on these points have not been more at variance than those of different individuals; and that as the latter often bend their principles to some predominant inclination, so the eccentricities in the manners, customs and morals of nations, very generally spring from some controlling superstition, the mandate of some powerful prince, the gradual influence of erroneous state policy, and even from the misapplication of sound principles. This is discernible, perhaps, in the famous notion of the Spartans, that no disgrace should attach to theft, but only to the awkwardness of the perpetrator in permitting its discovery. So, also, though the ignorant exceed the wise in number, yet in all nations and ages, the ignorant have generally preserved a tolerably accurate knowledge of the leading principles of morality, and respected the opinions of those whom they deemed their superiors in virtue and wisdom. And finally, the worst practices, whether national or individual, do not conclusively prove a want of knowledge of those principles of morals which they violate. So that all these objections amount to nothing more than what is obviously a fact, viz. that policy, passion, false reasoning, erroneous education, the corruptions of our nature, &c. cause both communities and individuals, civilized and

savage, occasionally to swerve from the clearest dictates of reason and moral sentiment. On this fact we shall have occasion to comment fully hereafter.

An appeal, however, to human opinion as an index of truth, is a very different thing from making it truth itself. So, likewise, to assert that the judgment of mankind has hit, for the most part, on the just principles of the natural law, is very distinct from the proposition, that what it esteems right, is therefore right. It is very certain that there are principles of action more conformable to the design of our nature than others; and there is no difficulty in conceiving, not only that some of these might lie hidden perhaps forever from mankind, and yet not be the less true, and consonant to our nature, than if they had been discovered to the whole world, but also that moral truths, at one time distinctly known, valued and practised, may nevertheless, from a combination of causes, be almost wholly effaced from the human mind and heart. Nor is there any danger to be apprehended from this doctrine; for if it be asked, if all men were now to consent to the truth of an opposite system of morals from what now obtains, could it be demonstrated that they were in the wrong? the reply to such a question would be two-fold; first, that the truth of a proposition is not to be tested by such an extreme supposition, it being unfair to make it, as it rests on the denial of one of the main sources to which we refer our knowledge of moral good and evil. And as we conceive it to be utterly impossible for mankind to consent to any such system, it would be testing the soundness of a given proposition by a concession which cannot be granted without virtually abandoning the proposition itself. But secondly; although the belief of all mankind may be safely appealed to for the nature of truth, yet an opinion concurred in by many, and even by most nations, is only presumptively true. Every man is conscious in his own mind, that he

does not believe a proposition merely because it is held by others: we ask for proof, and that proof is not the counting of numbers, but the comparison of principles, made by our own ratiocination; and when the opinion is formed, a contrary opinion of numbers will not shake it, unless sustained by reasons sufficient to countervail those on which we based ours.

The point under consideration is very important to the just apprehension of various questions of natural law, affecting the communion of nations no less than of individuals. It has been doubted whether there be any law of nature independent of what has been revealed in the scriptures; and whether the law of nations, in its primitive, and most extended sense, be any thing more than the *jus naturæ* applied to nations as mere individual moral agents; or, in other words, whether there be any laws of nations, except the moral precepts revealed to mankind by God in his scriptures, which are of universal obligation, or those contained in certain positive institutions and compacts of nations, which are obligatory only on the particular nations by which they have been adopted.

Ancient philosophers generally, the Roman civilians, and many of the jurists of modern times, as Puffendorf, Hobbes, Burlamaqui, Vattel &c. maintain that natural jurisprudence needed no aid from Deity for its ascertainment or obligation; and that the *Jus Gentium* is this natural law applied to nations as to individuals, with no other difference than what arises from the respective nature of the two subjects of its operation. Grotius, Huberus, Bynkershoek, and many others deny that there is any other law of nations than that which is positive or instituted, and consequently none that is of universal obligation; and Mr Ward goes so far as to say that there is neither a law of nature nor of nations, but that which is enjoined in the scriptures.

Though we agree with those who hold that natural law is ascertainable by the faculties of the human mind, and that there can be no universal law of nations except as it arises from this law applied to nations as moral entities, yet we think that Puffendorf and others err when they appeal to the manners, customs and institutions of nations for the law of nature and nations itself. We admit that what is universally approved by mankind, must be regarded as true, and that what is generally approved, is apt to be true; but we object to the general conclusions which have so often been drawn from particular facts. The fault of Puffendorf's reasoning on the natural law, as deducible from the consent of mankind, is that he places too much reliance on the views and practices of particular people and nations: he is too much disposed to educe general rules from special customs; the very opposite of which is the doctrine of Mr Ward, who allows nothing to be obligatory as a law of nature, unless it be universally approved; and hence he argues that there can be no natural law except the law of God, since, as he contends, there is no one point of morals on which mankind have universally agreed.

On this topic Puffendorf appears to have mistaken Aristotle; for the very passages cited by him from the works of that eminent philosopher, prove, we think, that Aristotle looked perhaps to the universal consent of nations, as furnishing evidence of the '*jus naturæ*.' The passages to which we allude are these: 'Natural justice I call that which bears the same name in all places, and doth not depend on particular sentiments;' and again; 'there is a general right and wrong, or just and unjust, believed and professed by all men, although no society should be instituted among them, and no covenants be transacted;' and finally; 'by a kind of natural divination, all mankind distinguish generally what is just from what is unjust, independently of all

social distinctions.* We do not perceive how from the foregoing passages Aristotle can be claimed as an advocate of the opinion, that the natural law is to be drawn from the manners, laws, customs and institutions of nations; but just the reverse. It is evident that he relies on universal, not on partial opinions; and also that by 'natural divination' he evidently meant what Dr Hutcheson has revived under the name of moral sense, and what Burlamaqui calls moral instinct. And to nearly the same purpose is the opinion of Grotius, who, after establishing the principles of the natural law in the constitution of human nature, adds, 'all I have been saying would in some measure take place, were we even to grant that there is no God, or that he did not concern himself about human affairs.'

(6.) A further examination of this doctrine, and whether the law of nature and nations can extend to actions morally indifferent.

Although the consent of mankind, even were it universal on a given point of morals, would not render such point obligatory as a natural law, yet the universality of the consent would furnish strong evidence of its truth. Consent, then, can be in no case the source of this law. But it is contended by some, that consent is the only proof we can obtain of the truth, and, hence, that the laws of nature and nations are derived from, and made up entirely of the customs of nations, and that we are to digest these several codes from the existing manners and institutions among them, without reference to what is called with us intrinsic good and evil. To sustain this singular doctrine, its advocates have been obliged to rely on certain positions, the fallacy of which appears to us extremely manifest. These positions are, first, that a variety of opinions on any subject proves the uncertainty or falsehood of all. Secondly, that there can be no criminality in actions which

* Arist. Rheto. Lib. 1, cap. xiii.

proceed from ignorance of those principles which we refer to the natural law; and lastly, that the general prevalence in any age or country, of principles at variance with our own, relieves those who practice them from all just imputation of guilt! Such are the wild doctrines to which speculation leads us, when we give up reason, conscience, and common sense, as the sources of our knowledge of right and wrong.

The inquiry, then, is, are we to look for the laws of nature and nations in the actual practices of states and of people, or in the judgments of reason and of conscience? Are we to abandon the guidance of our judgment and moral sentiments, and, against the convictions of both, pronounce right and true what happens to be practised by very many of our species? Are there no means possessed by every individual, of arriving at truth, though the actions of a majority of his fellow beings indicate opinions contrary to his own? We think there undoubtedly are such means, and that an individual might be theoretically and practically in the right, though opposed to all mankind; and so they might all be in the wrong.

This is stating the question in a form much more favourable to the views of our opponents, than the history of our species warrants; but even when thus stated, the argument, we think, is decidedly against the adoption of prevailing customs and opinions as the test or measure of the natural law of individuals and of nations. We have admitted that opinions very generally adopted and practised by mankind, are extremely apt to be sustained by sober reason, and sound conscience; but we deny the fact, that opinions hostile to what we call sound morals, have very generally been approved. It is, indeed, a remarkable fact in the history of man, that people the most separated by space, time, civilization, religion &c. have nevertheless maintained a wonderful, and almost universal congruity of opinion

on the cardinal notions of human rights and duties. So striking is this circumstance, that it would be matter of extreme surprise how they came thus to agree in sentiment, were we to refer this to consent or accidental coincidence, instead of some necessary principle of our nature, whereby, from the same premises, they have been conducted to the like conclusions.

In casting our eye over the history of our species, whatever may be the occasional deflexions from sound moral opinions, and the still greater departures from moral practices, we contend that the more general feature both of opinion and practice has been conformity to, rather than ignorance and disregard of the fundamental rules of morals.

But whilst this has been the case very generally, it must be conceded that in different ages, and in various countries, civilized and barbarous, there have been customs, manners, laws and opinions, altogether variant from what is approved under the natural law and christian code, and which would seem to imply in them the almost total absence of such a conscience, moral sense, and right reason, as we are in the habit of appealing to.

Hence it has been strangely inferred, first, that reason and sentiment are not to be regarded at all, nor are the opinions of men and of nations entitled to any respect, even as evidences of the natural law. Secondly, that there can be no other natural law than what has been revealed by God in his scriptures, which is the only standard, or obligatory measure, of right and wrong. And thirdly, that all those practices and customs which we call unnatural, criminal and shocking, are neither the one nor the other, when practised by nations ignorant of revealed law, and who thus act from the general prevalence among them of opinions different from our own. All the foregoing inferences we hold to be utterly untenable.

And first; no position appears more strikingly erroneous than that which denies to man the privilege of invoking the opinions and practices of his species, in confirmation of his own sentiments and reasoning, merely because those practices and opinions differ among themselves, or because his own may not always be consistent. He has a right to appeal to them whenever they conform to his own, as evidence of their justness; but so, likewise, if they differ from his, he has a right to compare the effects of his opinions and practices with those which attend the contrary opinions and practices of others.

It will be perceived that one class of these philosophers rely on the opinions and practices of nations, as the only means of becoming acquainted with this law, excluding the claims of individual reason and sentiment; whilst the other class refuse to appeal either to the opinions and practices of nations, or to the reason and sentiment of individuals, because the former so often differ from the latter, and among themselves; and hence is it that they refer us to the scriptures alone. Here we may take a middle course, and whilst we deny that the customs of nations make this law, and are to be resorted to as the only certain manifestations of reason and moral sentiment, they may certainly be appealed to as evidences, and, as such, may be relied on to confirm our opinions when in conformity with theirs. So, taking reason and sentiment as our guide, we may demonstrate the fallacy of theirs; when they differ from ours; virtuous and vicious practices needing generally no other illustration than their practical effects. To admit that we have no sure opinions, and no immutably wise and salutary practices, because they differ from those of other nations, which must, for that reason, be regarded as equally virtuous and wise with our own, would be to admit a course of argument destructive of all reasoning, confounding the distinctions between right and wrong, destroying at once

the charm of virtue, and the odiousness of vice, and involving us in the most absurd and gloomy pyrrhonism.

The proposition, that a variety of opinion on any subject is proof of the uncertainty or falsehood of all, is so weak, and so glaringly erroneous, that any one unacquainted with the grave follies of the learned, would hardly believe it possible such a notion could have been seriously uttered. Were this proposition admitted, all truth would vanish from the world: nothing could be certain, or received as true, since every thing has been doubted or denied. The existence even of the material world, which we see and feel and hear, was questioned by Bishop Berkeley; the intellectual or spiritual world was equally doubted by Mr Hume. Descartes was certain of only one thing, '*cogito, ergo sum,*' being his single maxim. No moral or physical truth has escaped this doubting madness; nature, the God of nature, his omnipotence, and, in turn, every attribute ascribed to him, have been denied. But though there have been no truths so manifest, no facts so obvious, no reasonings so irresistible, no feelings so acute, no affections so delightful, as not to have been doubted or denied by the sceptical of some age or country, it is vain, nevertheless, to argue hence against that perception of certain defined truths, of which every man is conscious. Indeed these doubts not only contradict themselves, but are, after all, nothing more than eccentric opinions of an extremely small minority, entitled to no consideration whatever, when placed beside the common sense of the bulk of mankind, and the close and sober reasonings of some, who, to lay all other claims to consideration aside, outweigh, even in number, those who have attempted to reason on the other side.

Those writers, therefore, who have inferred that there is no evidence of a natural law to be deduced from the opinions of men, because there has not been in them a perfect uniformity, are compelled to go the whole length of the

absurd proposition, that nothing can be certain which has ever been denied.

Some of these sceptics, unable to resist every ray of truth, admit that we may arrive at some sure mathematical conclusions, but contend that no others can be relied on, and that consequently they alone have remained undoubted. But, it may be asked, why are mathematical conclusions alone certain? are not many moral, physical and historical truths equally susceptible of demonstration or proof? But even in mathematics, men have doubted for a time; as, for example, on the subject of the logarithms of negative quantities, or the negative sign in algebra, &c. All mathematical truths ought, therefore, to have been equally doubted.

So, also, in natural religion there have always been numerous grounds of doubt, and very various opinions; but would any one for this reason suppose that the Grand Lama is not a grand impostor; that Juggernaut is not a monstrous idol of the darkest superstition; that Mahomet was not merely a crafty politician; and that Jesus Christ was not the most sublime, the purest, and the most disinterested of all moral teachers?

So, in the science of government opinions have at all times been extremely various; but that variety surely does not prove that all our notions of government are equally vague, uncertain and false, and that our own mixed form, for example, is equally defective with those in which there is neither responsibility nor checks and balances.

Metaphysics have been full of doubts and contradictory opinions; yet who will place the philosophy of Reid and Locke, and Stewart and Brown, alongside of the jargon and learned whimseys of Kant and Leibnitz, Fichté, Hartley and Boyle?

In chemistry every thing has been hoped, wonders accomplished, and many things questioned or denied; but who would look with utter incredulity on the experiments

of Lavoisier, Ingenhouz, Black, or Sir Humphrey Davey? Who would now resort to the occult and mystical science of Paracelsus, with as much hope of finding truth, as in the pages of a Priestley, a Henry, or a Thompson? And lastly, every department of natural philosophy has been disgraced by the most absurd theories; yet who presumes to question the discoveries of Newton, of Halley, of Kepler, of Franklin and others, or at least the utility of most of their philosophy? Hence, nothing can be more unsound than the inference that, because some nations and people, ancient and modern, civilized and savage, have maintained opinions and practices shocking to reason and sentiment, our notions of right and wrong may therefore be equally false and erroneous.

Secondly. Let us now examine whether there be no other natural law than what is revealed by God in his scriptures.

Burlamaqui, as we have already intimated, holds that God has invested man with two means of ascertaining the dictates of the natural law, viz. moral instinct, and reason. By the former he admits that he means the same thing that Dr Hutcheson does by the term, moral sense; and that by this faculty man is enabled to know instantly, in certain cases, moral good and evil, by a kind of sensation or taste, wholly independent of reason and reflection. He exemplifies this in various ways, as, that the pains of others excite our compassion; that gratitude is an emotion involuntarily felt towards a benefactor; that man naturally loves his species; that ingratitude is a vice acknowledged to be such by every human being, however debased; that veneration for age, respect of parents, honesty, sincerity and justice are naturally preferred by all men, (though their practice is often different) to their correspondent vices; and he thinks that no other account can be given of these sentiments, than that Deity has chosen so to form us; and final-

ly, that this quick and lively faculty is particularly necessary to the bulk of mankind, who are incapable of much ratiocination, and who, if it were otherwise, would do better with this moral instinct, which has no occasion to wait for the deliberations of the mind, than to rely on reason, since numbers of human beings, ever so capable, do not care to reflect about any thing. He then adverts to the objection, that there have been, and still are, many savage nations apparently indifferent to these sentiments; but he is inclined to doubt, not only the accuracy of many accounts given us by voyagers and travellers as to the shocking depravity of nations, but the inferences which philosophers have deduced from them. He justly concludes that we are often mistaken or ignorant as to the true reasons on which certain revolting customs and practices are founded, and that if what we call vices, are ever virtues with them, it is because they have greatly abused their reason and moral nature, and have been gradually led by controlling circumstances to pervert and misapply good principles. With respect to some customs and practices of enlightened nations, he contends that the abuse of a virtue is no proof of its non-existence; that shame and modesty, chastity, and love of offspring, are all natural, but that by irregular and debauched lives these powerful sentiments may be nearly extinguished; and that it would be as fair to argue that self-love is not an inherent and natural principle, because men, through passion or other motives, sometimes squander their substance, tear their limbs, and sacrifice their lives; as that gratitude, honesty, compassion, abhorrence of murder, &c. are not the natural products of the human mind and heart, because men often practise the opposite vices.

Mr Ward, on the other hand, in his treatise on the Laws of Nations, wholly denies the sufficiency of reason and moral instinct to acquaint us with the dictates of natural

law, as a universal rule of action. . He denies the existence of that faculty, call it what you will, which is said to enable us to distinguish, in most cases, between right and wrong. He contends, not only that the contradictory opinions of different nations, and of the philosophers of the same nation, prove that there is no such thing as a universally obligatory natural law, but that we can with no propriety appeal to the existence of any opinion as even evidence of its truth, unless that opinion be universally adopted. The learned author admits, however, that every man must be guided by his reason, and may in most cases discover what is proper for him to do or to avoid, and thus becomes a law unto himself; but he says that no man, nor set of men, are competent to point out rules of action obligatory on the human species, and that neither natural reason, natural conscience, nor both united, are able to digest a certain and fixed rule for the guidance of our moral conduct. This, he thinks, is altogether the gift of divine revelation, which imposes a code of private and public ethics, obligatory only on such nations as have embraced christianity and judaism; and there can be no law of nature and of nations, of universal obligation, until the whole world shall have adopted the scriptures as the common standard and rule of faith. He enumerates many shocking practices in which savage and civilized nations have indulged, and which he relies on as proving great diversity of opinion on the subject of morals and natural law, and consequently that no rules derived from nature, can be sure and obligatory on all.

Having explained the opinion of this ingenious writer, I propose to examine it with some attention, as it is essentially obnoxious to nearly all the objections which might be made to most of the foregoing theories.

First. It must be admitted to be at all times an unsound mode of reasoning, to argue from matter of fact to matter

of right, or, in other words, that because things exist, they rightfully exist. So, on the other hand, it is equally illogical, and indeed eminently absurd, to argue from matter of right to matter of fact, as the whole history of man lamentably shows. Admitting, then, the truth of the historical facts relied on by Mr Ward as tending to prove that every species of conduct which we consider criminal, unnatural and abominable, has nevertheless been practised and approved by various nations, the inference is far from just and logical, that these actions are not criminal in the sight of God, and condemned of sound reason and natural conscience. The fact of their being practised, is not even presumptive evidence of their being rightfully practised, because, if such facts are evidence either of the innocence of these actions, or of the error or uncertainty of our opinions, we might then, with equal and greater propriety, appeal to the contrary practices of nations, as strong evidence of the correctness of our views. I say there would be greater propriety in such an appeal, because, first, the fact is undeniable, that what we call moral virtues have been almost universally regarded as such, in every nation and age, the contrary practices being either very limited exceptions, or sustained by very doubtful authority; and secondly, because the clearest reasoning, and the strongest moral feelings of enlightened man, assure us of the intrinsic nature of good and evil, and of the manifest boundaries that distinguish the one from the other. If reason and moral feeling be of any worth; if civilized and educated man be a more noble being than the savage and brutal Indian; if wisdom have any claims over ignorance; we are entitled to assert that our opinions are right, and that theirs, so far as they contradict ours, are wrong.

Secondly. Is it not much more just to suppose that the accounts which we have of these odious customs and practices, have been sometimes misunderstood, often fabricated,

and generally over coloured, by ignorant, exaggerating or mendacious travellers; and that, when truly described, they may have been the result of gross superstition, of misguided reason, of wicked policy, of stifled conscience; than to regard them as evidence of the total uncertainty or non-existence of any fixed moral principles?

Thirdly. But why should the practices alluded to, shake our confidence in the certainty of moral discrimination, in the intrinsick beauty of virtue, in the hideousness of vice, and in our capability of perceiving the moral fitness of things; when, at the same time, the particular vices of individuals of our own society have no such effect? All experience teaches us that the most delicate and virtuous minds may by circumstances become so debauched, as to be insensible of all shame, regardless of all crime, and reckless even of their own personal comfort and safety; and yet no one commonly thinks of questioning, from such examples, the certainty of our moral reasoning and feelings.

Fourthly. Mr Ward's theory appears to be based wholly on the position already shown to be untenable, viz. that a variety of opinions on any subject creates a just doubt as to the correctness of any: and as this position cannot be maintained, the theory falls with it. Hence, if the fullest credence be given to the numerous shocking narratives of human depravity, to be found in Herodotus, Theopompus, Sextus Empyricus, Diodorus Siculus, Cæsar, and others among the ancients; and in Tavernier, Hakluyt, Thevenot, Broughton, Marsden, Petit, Mandeville, Marco Polo, Orellana, &c. among the moderns; and which have been so industriously collected and commented on by Grotius, Barbeyrac, Puffendorf, Picart, Taylor, Suarez, Locke, Hume, Bolingbroke, Montaigne, Montesquieu, Ward and others; still we do not perceive how the last mentioned author is justified in concluding, as he has done, that the laws of nature either do not exist at all, or are so confounded with our

prejudices, habits, and peculiar ideas of virtue and happiness, or are so variously made up from different casts of thought, and the varying perceptions of man, as to render it impracticable to fix on principles of universal obligation.* And to sustain him in this conclusion, he resorts to several positions as premises, which we can by no means allow him. He says, 'of man's nature I can obtain no knowledge except through the same channels by which I become acquainted with the nature of other animals; nor can I tell what it is that nature demands of man to do, except by inquiring what he has actually done.†

It is impossible to yield our assent to these positions, unless it be proved that man universally, or even usually, acts according to his moral nature, and the lights which he really possesses. Had man in all nations and ages pursued his true interest, and acted up to the obvious dignity of his nature, the inquiry into what he has actually done, could not fail, in that case, to unfold to us a faithful picture of his real nature. But Mr Ward's position is incorrect, we think, for another reason, viz. that it is not true that we have no other channel or means of knowing man's nature, than what we possess in regard to the brute creation. Brutes act by unerring laws, in obedience to unbending instincts; for this reason, there can be no swerving from their respective natures; we are therefore very certain of correctly understanding their nature, when we study their instincts, habits and actions. It is not so with man. He is a free agent; he may conform to his nature, or depart from it as he chooses; his actions are infinitely various, and no certain judgment can be formed of his intrinsic character, from contemplating his actions. It is true, we study his manners, customs, actions; but this we do mainly with the view of ascertaining his present condition, his factitious character. So, if we study the practices of na-

* Ward's L. of N. 54.

† Ibid. 41.

tions it is chiefly with the intent to learn their particular character, and actual condition; not to draw thence decided conclusions as to man's nature in general. The position is further erroneous, because every man knows his own nature, and possesses the power of communicating his knowledge of that nature to his fellow men. By this continued comparison of character, man has a means of becoming acquainted with the nature of his own species, which he does not possess in regard to the nature of other animals. With them we can hold no converse; we do not know what are their ideas (if they have any) as to their own individual character; their nature, then, can be known to us only through the medium of their actions. If we have succeeded in showing that these premises are erroneous, the theory founded on them has been sufficiently answered. We are willing, however, to travel through the whole argument, and perhaps there will not be much difficulty in showing its fallacy throughout. Let us examine a few of the numerous practices of nations, so often alluded to by ancient and modern writers, as evidence that the primary dictates of what we call the moral law, were to these people utterly unknown, and, consequently, that a natural law, in the sense used by us, can have no real existence. It will be found, we think, that, though taken indiscriminately, we shall discover in all cases a solution of the apparent difficulty, without resorting to the violent conclusion that all moral distinctions are equally uncertain; that none, as such, are obligatory; and that reason is unable to frame such a uniform rule of right and wrong, as shall bind mankind at all times to its observance.

The non-existence of the natural law is, indeed, a doctrine which, if antiquity made all things venerable, might claim for itself a full measure of respect; for Hobbes had his prototype in Carneades. The celebrated opinion of that ancient academician, as preserved by Lactantius, is

nevertheless, we think, unmixed absurdity. We shall, however, quote the passage, which may be thus rendered. 'Laws were approved by men for their utility: they are consequently often changed by customs and by times, according to the views of those by whom they were originally constituted. But there is no natural law. All men, as well as all animals, are conducted to their various kinds of utility by their respective natures. Hence, there can be no justice; or, if there be any, it must be extreme folly in those who allow it, since, in consulting the good of others, the just would thereby prejudice themselves!' This philosopher of course supposed that utility was altogether individual, and could be promoted only by the selfish appropriation by each man, of all that he could get; and that nothing but extreme folly could induce any one to respect the claims of others. Comment on such a philosophy were needless.

We now proceed to examine some of the vicious customs and laws so often relied on by those who follow the doctrine we have been so long endeavouring to impugn.

1. Herodotus, among very many like prodigies, relates that the Babylonians have a custom by which every woman, a native of the country, is obliged, once in her life, to attend at the temple of Venus, and prostitute herself. Any stranger passing by, threw her a piece of money dedicated to sacred purposes, as an indication of his choice; and women even of the highest rank never failed to comply with this law.* The fact was no doubt so, as it is verified by other authorities; but it is to be remarked that the origin of the law is not sufficiently explained, and the narratives of Herodotus are to be taken with some allowance, as this 'Father of History' is known to have been extremely credulous, and much given to fable. This was his reputa-

* Herod. Lib. I. § 123.

tion even among the ancients. Hence Cicero says, '*Apud Herodotum, patrem historiæ, et Theopompum sunt innumerabiles fabulæ.*'*

2. Among the Sabeans one woman was the wife of a whole family; and in some countries women were privileged to have any number of male concubines, by which means fathers could not be ascertained; and mothers were rendered equally uncertain by the practice of changing the infants as soon as they were born.† But even in these countries, and with these abominable practices, the general dictates of nature and reason may have been known and respected. Reason is often perverted on particular points, and grossly misapplied by overweening prejudices, when the heart and mind, in most other respects, are preserved in purity.

3. Zoroaster allowed parents and children to marry, and the Magi, who followed his laws, permitted no one to be of their body, if not the offspring of such a connexion. Can there be any doubt that this was owing to some powerful superstition, that applied, perhaps, a sound rule of morals to a wrong set of facts, and thus produced this great moral deformity? And Cæsar also relates that among the Britons '*Uxores habent deni duodenique inter se communes, et maxime fratres cum sororibus, et parentes cum liberis.*'‡

4. Infanticide has been practised by various nations. The Spartans considered children as belonging rather to the state than to their parents. To enable them to defend their country, they resorted to a most rigid physical education. Reason and morals yielded to military zeal, and under the mistaken idea that infants of slender constitution might prove rather a burthen than a defence to the state, they had them submitted to the examination of tryers, on whose favourable report they were not only suffered to

* Cic. de Leg. lib. 1. ca. 1.

† Diod. Sic. Lib. 2.

‡ Cæsar De Bel. Gal. lib. 1. c. 5.

live, but were thoroughly educated to arms; but if pronounced irreclaimable, were cast into a deep cave on mount Taygetus. The like cruelty was practised among the Thebans; and, for a different reason, the Chinese do the same thing at the present day.

That infanticide violates both reason and nature, cannot be denied; but how often is the voice of humanity and of reason stifled by the strong necessities, actual or supposed, of state policy; and how often does the repetition of crime lessen the horror of its first commission, until the hated act at length becomes almost venerated from age and unopposed custom?

5. Various nations have not only permitted, but sometimes encouraged, what with us are called incestuous connexions. By a law of Solon, an heiress was compelled to marry her next of kin, and a wife whose husband was impotent, might cohabit with her husband's nearest relative. Brothers and sisters were also permitted to intermarry, and frequently did so.

These practices of civilized and savage nations in regard to marriages, have raised a question whether incest is ever a crime *jure naturæ*: whether it is ever *malum in se*. It has by some been contended that our abhorrence of such connexions is to be ascribed wholly to the fact that we have received our moral code from the Jews, among whom it became odious in consequence of the positive law of God; but that it is not against the *jus primarium*, or primary law of nature. This controversy is not yet settled among the casuists, nor do we intend any minute discussion of its merits. We may remark, nevertheless, that revolting as all such marriages justly are, (knowing as we do that they violate, not only the express law of God, but our established notions of the decencies of life,) yet it was entirely otherwise among the Greeks, Persians, Egyptians &c. who had no knowledge of the law of God, and were led away by vari-

ous circumstances from the delicate and accurate views which we entertain on the subject. And though mere reason would, on due examination of their consequences, lead us to condemn all such marriages between persons closely related, yet the intrinsick difficulty of establishing the legitimate boundary of such connexions, seemed to pray the assistance of divine positive law to settle the doubts which might otherwise arise. To what extent, if any, this is a merely positive prohibition, or whether it be in whole, or in part, a dictate of the *jus naturæ*, affirmed by the scriptures, is to the christian a point, perhaps, of no peculiar interest. To the mere moralist, however, the question is important, for it is not sufficient that the notions of society are strongly against all such connexions. It behoves him to have some comprehensible rule on the subject, and that he should know the grounds of that repugnancy. As society is constituted with us, there is no difficulty in tracing the source of that abhorrence with which we contemplate such connexions as amount to either civil or natural incest. And here it is necessary to distinguish between these two. Natural incest is sexual intercourse between persons related to each other in the ascending or descending line. Civil incest is the like connexion between those who are collaterally related. As to the former, it is so obviously against the course of nature, or so inevitably pollutes the purest sources of some of our best affections, or so necessarily confuses rights and duties which ought to be distinct, that reason and natural feeling, if not greatly perverted, unite at once in declaring it to be *malum in se*, and a violation of the primary law of nature. In regard to the latter, viz. civil incest, though it be forbidden by the law of God, and is offensive to the established decorum of most societies, it is, by some opinions, not *malum in se*, and violates no fundamental rule of natural law. Yet in so far as concerns

the order and quiet of society, it may be difficult, in many cases, to distinguish it from the former.

Under this distinction between natural and civil incest, it is held that all marriages in the ascending or descending line, however remotely related the parties may be, are naturally unlawful. There is a quick sentiment of detestation against natural incest. Reason at once perceives that the order of life is invaded, that the veneration due to age, the protection due to youth, and the rights and obligations of relatives, would be utterly confounded by such connexions. The heart and mind unite in revolting at this departure from nature, which 'propagates by succession of one generation upon another, and not by those we breed, or through whom we have been bred.' Such marriages may therefore be declared unnatural, shocking and unlawful *jure naturæ*. But civil incest, however abominable it sometimes is, however clearly within the degrees prohibited by divine positive law, and however it violates the decorum of society, is still, in the opinion of many, *malum prohibitum*, and does not violate the *jus primarium*. Hence, persons related to each other in the collateral line, even in the first degree, as brothers and sisters, do not violate the primary natural law by their intermarriage. Hence, those nations, civilized and savage, that tolerated civil incest, violated no immutable law of nature, no divine law, no law of man. The first has not forbidden it, the second was unknown to them, and the last, so far from forbidding it, often encouraged, and sometimes commanded it. In a society where christianity prevails, and where the laws and usages of the people forbid such connexions, it argues the greatest depravity to violate public decency by such a marriage, as it breaks in upon one of the strongest trusts reposed in man, invades the sanctity of private life, and proves the wretch who is guilty of it, capable of violating all other confidences the most sacred.

Inattention to the distinction, delicate as it sometimes is, between natural and civil incest, occasioned no doubt the unwarrantable inference, that incest *generally* is merely *malum prohibitum*, and that it violates in no case the *pudor naturalis*; a conclusion not only false, but unsustained by the alleged practice of incest in the infancy of mankind. It is not true that natural incest was ever permitted by God, or practised in the infancy of mankind. As God, in his wisdom, did for a time permit mankind to be propagated through the medium of what is now called civil incest, the just presumption is, that this does not contravene the primary law of nature. In after times, he saw fit to prescribe the exact limits within which collaterals might marry; but this was a regulation wholly positive, founded, indeed, on infinite wisdom, and an accurate foreknowledge of man's nature, and in no degree impugning his own eternal law. If no distinction be made between natural and civil incest, and the moralist will not be bound by the Levitical degrees, it will be impossible for him to ascertain the point at which the law of nature, ceases to prohibit the union. If the ascending and descending lines be wholly excluded, and positive law should forbid a union between persons in the collateral lines, within certain degrees, none will be found more consentaneous to reason, and the order of societies in general, than those prescribed in the law given to the Jews. All christian nations, however, have not adopted the Levitical degrees. In some countries, marriages within the whole ascending and descending lines, and those within the first degree only in the collateral line, are referred to the law of nature, and are held to be void by a rule obligatory on all nations. In others, the forbidden degrees in the collateral line are carried beyond the first degree, and even beyond the Levitical degrees. Sufficient has been said on this point to show that the different customs of nations in regard to mar-

riage between relatives, can furnish no argument against man's ability to discover the law of nature.*

6. It is also said that, when Rome was the seat of refinement, and when its philosophers descanted on morals, many things were approved which violate our notions of the laws of nature; as, for example, that the accomplished Cato lent his wife Marcia to his friend Hortensius, and that this was usual among the Romans, in order to improve the race. That we may justly understand this anecdote, however, it would be requisite to take into account all the views, legal and moral, which the Romans entertained concerning the contract of marriage, and the free right of repudiation exercised, as well by the wife as by the husband. It is said, moreover, that Marcia was regularly repudiated by Cato, and then legally married to Hortensius, and that she was remarried to Cato after the death of Hortensius. To us these practices seem extremely revolting; but their existence among a moral and refined pagan nation, is no proof that the laws of nature have no foundation in immutable truth; but only that, on some points, reason may be perverted by licentiousness, by false prejudices, by tyranny, and many other causes. Improper laws and customs often obtain among a people against the known dictates of their reason and conscience, and are by no means to be relied on as proof of their ignorance of the truths they so constantly violate.

7. The Tartars, according to Hakluyt, have a strange custom. 'When any man's father deceaseth, he assembleth all his kindred, and they eat him!' We are informed by the

* Vide Grotius De Jure B. et P. lib. 2. cap. 5, sec. 12, 13; Puff. L. N. & N. lib. 6, cap. 1, sec. 32; Pliny's Nat. Hist. lib. 8, cap. 42; Memora. Socra. lib. 4, cap. 4, sec. 20, 22; Selden De Jure N. & G. &c. lib. 1, cap. 5; Butler v. Gastrill, Gilbert's Equity Reports, 156; Harrison v. Burwell, Vaughan's Reports, 206; Burgess v. Burgess, Haggard's Reports, 886; Wightman v. Wightman, 4 Johnson's N. York Chancery Reports, 343.

same authority, that the people of Thibet used to eat the bodies of their parents, in order that they might have the most secure of all sepulchres; and that they made cups of their skulls. Picart says that the Floridians ground the bones of their deceased relatives, and drank the powder; the inhabitants of Socatara waited not for the expiring breath of their kindred, but buried them alive; and the people of Java were accustomed to sell their old men to the Anthropophagi, or man-eaters. It is quite probable that these accounts are highly coloured, and it is very certain that naked facts, when stated without any of their reasons and accompanying circumstances, are frequently extremely shocking; but when explained, are sometimes innocent, and even meritorious. It is well known that the voyages and travels given by Hakluyt, are remarkable for want of veracity, and for the extreme cullibility of their authors. Mr Locke remarks of this writer, that 'he was no traveler himself, but stuffed his works with stories taken on trust from Tavernier, whose travels are full of mistakes, and from Picart, whose works are filled with trash.'

8. Speed relates that the ancient Anthropophagi of Ireland were accustomed to serve up, as a rare delicacy, the mammæ of women; and Picart assures us that the Antis of South America cut their prisoners piecemeal, while alive, and their women, smearing their breasts with the reeking blood, suckled their children. He further tells us that the Brazilians used to fatten their prisoners, and then eat them; that the widows of African kings are compelled to poison themselves on the demise of their husbands; and lastly, that the Mexicans adored an idol formed from every known seed, kneaded with the blood of infants! A thousand such disgusting accounts, true and false, might easily be enumerated; but we involuntarily turn from them, happy in the belief, also, that they are to little purpose in the argument, since, if admitted in all their shocking bareness,

they only prove, what has never been denied, that man, with all his boasted reason, and capacity for virtue and knowledge, is often inconceivably wicked and ignorant. Still, these practices can no more be said to establish his inability to discover truth, and to practise virtue in obedience to fixed laws, than would the practice so uniform among Indians, of enumerating wholly by the fingers, prove man's inability to discover solely by the light of reason, the fixed and infinitely various principles of arithmetic. The science of numbers, so truly wonderful, is now well known; and so is the science of morals. Theologians, when contending for the necessity of revelation, do not say that the fundamental principles of morals are not as demonstrable as those of other sciences. It is those great truths of our religion which are apart from a mere moral system, that are wholly above reason, and were therefore revealed; and in order to dissipate every uncertainty which the perversity of man might introduce into matters of such vital interest as sound morals, the dictates of reason and conscience have also been expressly confirmed by the scriptures. This is all, we suppose, that the learned and pious Pascal meant in speaking of the revelation of moral principles. The pride of man is extremely apt to place too much reliance on mere reason, while christian zeal is perhaps too willing to give up reason altogether. But to proceed.

Perverted as man really has been in all ages, his picture ought not to be drawn from such materials as we have collected from ancient and modern travellers. After all they have written, we are enabled to form only very crude notions of the real character, individual or national, of the people whom they have visited. Their manners, customs and laws are but imperfectly described, and almost always without their attendant motives and circumstances; so that often no sound judgment can well be

formed concerning them. A traveller, however intelligent, observant and candid he may be, sees things imperfectly. But this class of writers love the marvellous, and know that their readers are in this respect like themselves. They are generally in search of prodigies, and their imagination, added to their usual carelessness in examining facts and reasons, often from want of time, produces a caricature, instead of a likeness, of the people they describe. When we add that they are often unacquainted with the language, religion, superstition, prejudices and history of the people whom they describe, we need not wonder that these monstrous deformities, intellectual, moral and physical, have usually disappeared as the remote countries described by them have been subsequently explored. In regard even to the Anthropophagi, it is quite probable that, were their history thoroughly known, we should have less occasion to be shocked; although Sextus Empyricus is pleased to say, that such is the natural proclivity of man to feed on man, that the first law which was made after the social compact, was to prohibit men from eating each other. The Floridians, in more recent times, and the Brazilians, also, had no such customs as those we have stated from the early travellers into those regions; and such customs do not easily yield to the lapse of a century or two, unless when a new religion is forced on the people by foreign nations. The enlightened travellers of our own day see but few of the prodigies which were related only a couple of centuries past, of a people who since that time have held scarcely any intercourse with other nations, and cannot therefore be supposed to have changed. The Giants, Pygmies and Hermaphrodites; the Monosceli, or one legged people, the Monoculous, or one eyed people, the Blemmyes, or headless people, of Africa, the Cynocephali &c. &c.; all of whom have been gravely described by travellers, have entirely disappeared in this age of general illumination, which has

ranked geography among the sciences. If, then, the mere visible and physical characteristics of man; his stature, form &c. have been so strangely misunderstood, or intentionally misrepresented, (as they must have been, since neither time nor civilization could effect any change in these, had they existed,) it is nowise surprising that laws and customs, and complex institutions should have been still more grossly misapprehended. We are justified, then, in concluding that we are not sufficiently acquainted with the practices to which we have alluded, to draw any very decided inferences from them; and that, even were all true, they do not establish man's ignorance of the primary rules of natural law, or the essential indifference of all moral sentiments. The people thus painted, had confessedly many virtues, and, in all other cases, practised the very moral rules of which these particular customs would seem to prove them ignorant. It would, moreover, appear an absurd proposition, even to the most ignorant human being, that it is a matter of total indifference how he thought, as his opinion was probably as good as any body's else, seeing that even such a being would always recognize some standard of truth, and would adhere to his notions because he deemed them to approach this standard. Yet this is certainly the unvarnished meaning, and the necessary tendency of the doctrine I have endeavoured to impugn.

And this brings me, in conclusion of this subject, to the last inference that has been drawn from the notion that there is no natural law, viz. that the general prevalence in any age or country, of customs founded on the opinions of the people, takes from such customs all imputation of criminality, or, at least, so greatly extenuates them, as to render actions which are highly sinful with us, nearly innocent in them. There can be no doctrine in law or in morals, of a more dangerous tendency than this. It is one which has been often used, even with us, to gloss over the heinousness

of crime. Every vice of superstition, of misguided religion, of political phrenzy, has sought extenuation, and sometimes found justification, in this principle. Most of the pernicious theories in morals have been respected, and their authors screened from merited opprobrium, through this supple doctrine. The philosophy of Carneades, of Spinoza, of Hobbes, of Collins, Shaftesbury, Rousseau, Helvetius, Hume, and of many others, takes rank with that of the most orthodox writers. But we apprehend that the enormities of savage life, and the licentiousness of civilized people, can never be excused when not founded in invincible ignorance. Any moral system which compliantly moulds itself to the varying fashions of the times; any custom which seeks justification from general prevalence, and long use; must be practically mischievous. If the manners of the age, however general, are to soften the odious lineaments of vice, then may the grossest superstition be denominated religion; the most shocking persecutions, mere party zeal; and the most loathsome vices, sheer ignorance. The mild policy of a Trajan is no more meritorious than the ambition of an Alexander, a Tamerlane, or a Zingis-Khan. The murderers of Henry IV. of France, and of Henry II. of England, would then be mere zealots. So, also, in the private transactions of life, the worst of men may thus be excused, the most shocking crimes pardoned. The individual (it might be argued) was not well educated; his morals were greatly neglected in his youth; the like offences were long prevalent among his associates; their manners and customs were familiar to him, and consequently his crimes are scarcely to be regarded as such. This, in truth, is the substance of the argument fairly deducible from the doctrine under consideration; and its absurdity is made only a little more manifest by an example, and by putting it in higher relief.

I am quite sensible that the topics of this section of the lecture, have been dwelt on tediously, and perhaps unnecessarily. But the philosophy of universal jurisprudence is very closely allied to sound morals. The precepts of the *jus naturæ* are, indeed, the laws of laws; remove this foundation, and all instituted laws would become as the morning vapours. We conclude, therefore, that notwithstanding the cavils and sophisms of idle and subtle philosophy, the opinion is just and sensible which espouses the side of natural truth. This, we contend, is ascertainable through the reason and moral feelings of man; is based on the natural fitness of things; and is independent of all consent, manners and laws of men. This, it appears to me, places the laws of nature on their true basis: it makes them neither intuitive, nor yet dependant merely on human opinion. It admits that a system of rules, if not discoverable by the moral sense, as understood by Dr Hutcheson, is yet ascertainable by a ratiocinative process, often so rapid, and yet so unerring, as to amount to nearly the same thing; and is, at the same time, strengthened by a natural admiration of the beauty of virtue, and an abhorrence of the deformity of vice.

(7.) Whether Hobbes's doctrine, that nature did not institute society, but discord among men, justifies the conclusion of his critics, that society is against the design of nature. I spoke in a former lecture of Hobbes's celebrated hypothesis, that the state of nature is one of war, or continued hostility. From this theory his critics have drawn the conclusion, that society is against the design of nature; but this inference does not appear entirely just.

Nature has not produced man with the powers of speech, or the ability to reason justly; and yet no one concludes that man is acting against the design of his nature, when he is cultivating language or reason. Hobbes's idea, that nature placed man in a state of separation and discord, rather than of society and peace, is entire reconcileable with the

principle, that society is in the highest degree consistent with our nature, and promotive of our best interests. The passions unsubdued naturally lead us into excesses; but so far from acting against the design of nature, when we control them by a cultivated reason, and a guarded conscience, we are then fulfilling the highest behests of him who made us.

The warlike relation in which, according to this hypothesis, the first rude and ignorant tenants of the earth stood towards each other, if it has any foundation in truth, originated merely in an over anxious apprehension concerning their safety and interests, which we may suppose subsided into peace and security on the discovery of the probable benefits of social and civil union. So that, even allowing that self-interest, and rancour of man against man, were the chief fountains of human action, reason would soon assure us that the most powerful means of advancing our interest, is to be found in the establishment of society and government, and that these, although not established by nature, are altogether consistent with her designs.

(8.) Opinion of Hobbes, that the dictates of reason can be respected as laws, only as far as God or man has enacted them as such. That reason may furnish a rule of conduct, but not a law of nature, appears to be a mere verbal nicety. Hobbes thus expresses himself on this subject. 'If the laws of nature, so called, are the dictates of right reason, still they are not to be regarded as laws, except so far as they have been enacted by God in his scriptures, since those laws which we call natural, are nothing else but certain conclusions apprehended by reason, concerning things to be done, and things to be omitted, and since law, in a proper sense, is only the speech of him who, by virtue of his right, commands men to execute, or to abstain from some performances; therefore they are not laws as they proceed from nature, but only as they are enacted by God in scripture.* And in other places he asserts that

* Hobbes De Cive. chap. 3, sec. last. Puff. lib. 2, ch. 3, sec. 20.

good and evil are ascertained solely by civil institution, and that moral obligations proceed from the laws of society, and not from those of nature.

In reply to this distinction, it is perhaps sufficient to say, that it is not essential to a law that it should be conveyed to the subjects' knowledge in any particular form. It is immaterial how the sovereign's will is ascertained, whether by revelation, inspiration, moral instinct, moral sense, common sense, right reason, moral sentiment; for these are not the law of nature, but the means of discovering it; so that if we arrive at this knowledge through the most cautious efforts of reason, we are as much obliged by the command of God, as if he had vouchsafed expressly to reveal his will to us.

But perhaps Hobbes intended something more than to question the obligatory force of natural precepts, on the score of their not being, as he supposed, properly promulgated. When contemplating the penalties which reason declares to be consequent on the violation of the natural law, it might easily have occurred to so sceptical a mind as his, that we had no certain knowledge that these penalties were thus attached, and, consequently, that there would be no obligation until they were, so to speak, officially pronounced. He might also have supposed, as some others since his time have done, that as a penalty is essential to a law, if the penalty were the only source of obligation, we might choose to incur the penalty; a sort of reasoning which resolves all obligation into mere compulsion, and is, indeed, at variance with the whole theory of the cause and extent of moral obligation. Hobbes himself argues that, as the atheist never acknowledges his submission to the will of God, and as no one can have sovereign power over us without our consent, therefore the atheist, never having been under God's sovereignty, is not responsible for disobedience to his decrees! Whichever of the foregoing no-

tions may have prompted that philosopher to deny all obligation to natural laws, except when revealed by God to those who acknowledge his power, is not of any moment, since none of them have even sufficient plausibility to cause doubt in any mind. In reply to this notion of Hobbes, we may further remark, that the obligation to obey the laws of nature does not spring merely from their being the dictates of right reason, but from a well founded presumption that the author of the universe will not fail to punish the violation of his own moral system; and that our obligation does not rest in any degree on our assent to the sovereignty of God, but on his boundless power to compel obedience, his infinite wisdom, and his perfect benevolence, which, while they have made GOOD and RIGHT convertible terms, have mingled in every bosom, perhaps, an abstract love and admiration of virtue, independent of all selfish considerations.

(9.) Of the Primary and Secondary laws of nature. All who have treated natural jurisprudence, from Aristotle to our own day, have recognized a twofold division of natural law, under different names indeed, but all meaning essentially the same thing. By some these divisions are called the primary and secondary laws of nature; by others, proper and reductive, and again by others, absolute and hypothetical. Closely allied to these, if not the same, are what are called the permissive and mandatory laws of nature. These expressions may therefore be indiscriminately used. The words 'primary' and 'secondary' are adopted by Heineccius, Burlamaqui and others; but Grotius and Puffendorf use the words 'proper' and 'reductive,' 'absolute' and 'hypothetical.'

The primary law (*jus primarium*) is that which arises from the primitive and essential nature of man, affects him under all possible relations, has God for its immediate author, and never can be departed from. It enjoins or for-

bids those actions which are right or wrong under all possible circumstances, and embraces in its denunciation only those things which we call *mala in se*.

The Secondary law of nature (*jus secundarium*) is that which grows out of the relations established by man, as, for example, political union, marriage, property. Strictly speaking, it perhaps comprehends nothing that is *malum in se*; but it imposes a moral obligation to its observance, and sometimes includes in its prohibitions things so manifestly prejudicial, that the casuists have found it difficult to say whether they were not more properly referrible to the head of things *mala in se*, and as such embraced by the primary law of nature.

The explanation given of the Absolute and Hypothetical laws, shows that those who have used these terms, meant precisely what has been just stated. Dr Taylor says, 'the absolute laws of nature oblige absolutely all persons, at all times, and in all places, for they are immutable; the hypothetical laws oblige only conditionally, that is, supposing such and such conditions or relations of man actually to exist.'* So likewise, things are said to be referred to the law of nature either *properly* or *reductively*, and Grotius uses these terms to distinguish things due in strict justice, from such as justice does not contradict. Under the former he ranks perfect rights, and under the latter those which have been called imperfect.†

Burlamaqui considers the secondary natural law as consequent on the primary, and that it is nothing more than a just application of the general rules of the primary law to the circumstances of man, as they arise out of his own acts: and Dr Taylor, in speaking of the hypothetical law, evidently means the same thing when he says, that this law has only a possible or contingent existence, whereas the

* Taylor's Civil Law, 129, 130. † Grotius De Jure B. ac P. lib. I. ca. 1.

absolute law is eternal. The former, therefore, is said to be *in posse*, the latter *in esse*.

All admit, however, that this secondary or hypothetical law, when called into operative existence, is the law of nature; and being approved by reason and conscience, is morally binding. It is not a new law, but existed as natural law before the occurrence of those circumstances to which it is now made to apply. An example or two may illustrate the distinction alluded to. Society, though recommended, is not commanded by any law of nature; but when instituted, all the rights and obligations which grow out of it, are based on the secondary law of nature. The obligation to perform all our just promises and engagements, and to obey the laws of the land, is referred to this secondary law. So, also, the duty to abstain even from theft, is, in the opinion of some, referred to the *jus secundarium*; for in this way is Dr Taylor to be understood, when he says that if civilians declare that theft is base in its nature, they must mean that it would be so after property is once established.* The same opinion is entertained by the celebrated Francisco Suarez, who says ‘*Nam multa sunt de jure naturali quæ non obligant, nec locum habent, nisi aliquâ suppositione factâ; ut præceptum non furandi, non habet locum, nisi factâ divisione bonorum et dominiorum,*’† which we may thus render—For there are many things which do not oblige by the natural law, and have no place in it, unless in a given state of things; as for example, the precept ‘thou shalt not steal,’ is no part of that law until after the institution of property.

The distinction between the primary and secondary laws of nature, imports something more than the well known difference between actions *mala in se*, and those which are only *mala prohibita*. But in what the dis-

* Taylor's Civil Law, 131.

† Suarez De Leg. lib. 2. ca. 18.

inction really consists, and whether the *jus primarium* is confined to, or extends beyond matters *bona aut mala in se*, and whether the *jus secundarium* is restricted to, or affects matters beyond what are merely indifferent, are subjects by no means clearly explained by the writers on natural law. As we do not perceive any obvious utility in the distinction itself as far as it has been explained, I shall for the present at least, pass it by with a single remark; that positive laws, even when they regard only actions naturally indifferent, create nevertheless a moral obligation to their strict observance; and that, although actions *mala in se* are expressly forbidden by the law of God and man, and, in metaphysical strictness, the obligation to avoid them is said to remain the same, yet there can be no doubt, as obligation is generally understood, that it is increased by multiplying the sanctions, and by more clearly defining them, than under the *jus naturæ*.

(10.) The Laws of Nature relate, 1: to man's duty to himself, and 2: to his duty to his fellow creatures; and all these duties are referred either to the Absolute or Hypothetical laws of nature. We are now to consider the last topic assigned for the present lecture, viz. that division of natural jurisprudence which refers all the laws of nature either to man's duty to himself, or his duty to his fellow creatures. The former has been subdivided into five classes of duties, viz.

1. The cultivation of his moral and religious nature.
 2. The improvement of his intellectual faculties by the acquisition of all useful knowledge.
 3. The preservation of the health of his body and mind.
 4. The honest acquisition of property, and
 5. The pursuit of salutary pleasure.
- In regard to the whole of these duties, it may be remarked, that every act by which these several ends are promoted, has its peculiar gratification independent of the particular object in view, and that, when combined, they constitute a scheme of varied felicity which, while our duties leave no pause in our exertions, and permit no waste

of a particle of time, is amply sufficient to refute the notion entertained by some, that our existence is gloomy or even indifferent. Heaven bestows on the energetick toiler through life, abundant recompense, even here, for every privation and every enterprise.

The latter branch of man's duties, viz. his obligations to his fellow creatures, has also been subdivided into classes, viz. 1. Such as are absolute, that is such as oblige all men in all countries, and independently of all human laws and institutions, and 2. Such as are hypothetical, that is, such as arise after the establishment of society, but which are nevertheless founded on the condition of mankind considered in general, and which are also not the creation of mere positive law.

We are first to examine into the five classes of duties which man owes to himself; and secondly, into the two classes of duties, viz. absolute and hypothetical, which he owes to his fellow creatures.

1. Man is said to be under a moral obligation to cultivate to the utmost extent of his power, that social and religious nature which so eminently distinguishes him from every other animal, and binds him by the most tender relations to his species, whilst it enables him to hold communion with his Creator.

The cultivation of religious and social affections contributes largely, not only to our own happiness, but to that of others. Were all men religious and social, they have intelligence enough to render legislation almost useless. He is sure to be a good citizen, who respects religion, and values the happiness of others; otherwise the highest intellectual attainments, so far from conferring happiness on ourselves or on others, are only so many instruments of misery to ourselves, and mischief to others. The first duty in life, therefore, is to cultivate the most exalted re-

verence for the Supreme Being, and the most expansive benevolence towards our own species.

2. A duty next in importance, is the acquisition of every species of useful knowledge. In all the relations of life, knowledge renders us happier, and gives to religion and benevolence their proper direction. A highly embellished mind is apt to be a generous one; it renders its possessor a kind and discriminating parent, a prosperous and beloved master, a tender and judicious husband, and an industrious and efficient citizen.

Whatever may be our talents, whether for command or obedience, whether various, or limited to a single point, it is our duty to improve them. Mrs Barbauld has judiciously remarked, that 'nature is much too frugal to heap together all manner of shining qualities in one glaring mass.' It is our duty, therefore, to cultivate with assiduity the particular talent which nature seems specially to have designed as the individual means of our usefulness. Nature has endowed most men with some predominant capacity, and a correspondent inclination, for a particular pursuit. The various apportionment of talent to which I allude, seems to indicate our duty in this respect, and renders it almost criminal to devote our lives either to idleness, or to the pursuit of useless knowledge. The soil of the human mind when permitted to lie waste, or when cultivated in a manner not adapted to its particular nature, must produce a moral vegetation not useful but baneful. Learning itself should keep in view a defined and useful object, and be made ancillary to those virtues and graces for which it never can be a substitute. Knowledge, which is only the ornament of good sense, and the efficient agent of wisdom, is powerless without them. 'A mere scholar,' says Epicetetus, 'is an animal that all the world laughs at;' and Quinctilian sensibly remarks, that 'prudence can do more without learning, than learning without prudence.' Whilst,

therefore, a richly cultivated understanding greatly enlarges our means of usefulness, the foundation of all education should be laid in good morals, and in sound sense.

Knowledge may be divided into three classes, viz. the Useful, the Curious, and the Insignificant. In the acquisition of the first two, we may be profitably and honourably engaged; the last may be consigned to the incurably idle, and is at best but a less mischievous mode of wasting talent. The mischief done to true science, and sound morals, by insignificant or vain learning, has been great; and the history of learning, and of learned men, furnishes innumerable curious examples of genius and toil strangely and unhappily misapplied. How often do such men bring a reproach on true philosophy by their idle speculations, and their surprising ignorance of the business and utilities of life! 'I hate men,' said an ancient sage, 'who are philosophers in opinion, and drones in business.'

The learning of the present age, however, is liable to but little of this reproach, and is daily becoming less so. It is far from my intention to inculcate in the students' mind a distrust of all knowledge, the utility of which is not obvious to him at the first glance. I mean rather to express my respect for those philosophers whose investigations, though minute and various, have never been trifling; and to reprobate those whose lives have been spent in spinning webs for posterity to disentangle; those to whom Martial alludes in one of his epigrams:

'Tis shameful men should needless knots invent,
To prove laboriously impertinent;

and those aimed at by another poet, when he speaks of men who

—— tread on flowers of taste,
Yet stoop to pick the pebbles from the waste,
Profound in trifles, they can tell how short
Were Esop's legs, how large was Tully's wart.'

And to this class of men Lord Bolingbroke alludes when he says, 'I would rather take Darius, whom Alexander conquered, for Darius Hystaspes, and make as many anachronisms as a Jewish chronologer, than sacrifice half my life in collecting all the learned lumber that fills the head of an antiquary.'

3. The next class of duties which we owe to ourselves, regards the preservation of our health of body and of mind. This is a duty closely connected with those we have already mentioned, since without health, nothing great or excellent can be expected from the capacities of either mind or body.

Nothing, at first view, would appear more unnecessary than to urge upon men the moral obligation of taking care of their health, seeing that self-preservation is so natural to all animals. It is however a melancholy truth, that this dictate of nature is constantly disregarded. Men are often utterly reckless of the condition of body and mind; and even when they desire health and happiness, have neither firmness nor principle sufficient to resist the force of their passions. They forget that the body is no more their own, than is the mind, and that the former is given in trust to the latter; they forget the sacred nature of that trust, and sometimes justify even suicide, under the idle notion that man has an absolute right over his own body. This flimsy argument has been used by learned, and even moral men, in ancient times; and others of our own day have not scrupled to disapprove of the odium attached to the act, and of the legal penalties by which it has been so justly reprobated.

The perversity of man is such, that the strongest encouragements and denunciations of the law are often needed to deter them, if not from self-immolation, at least from a criminal disregard to the means of preserving their mental and physical powers. And though it is the general

policy of governments to take no cognizance of private vices, but to punish only such open crimes as by their example may become prejudicial to others, it is sometimes necessary to go beyond this principle, and to extend the incitements and comminations of the law to such habits and conduct as affect rather the private individual than the citizen, and the domestic rather than the political relation.

4 and 5. The honest acquisition of property, and the innocent pursuit of pleasure, are also duties which every man owes to himself. On the highest authority, he is declared to be 'worse than an infidel, who provides not for his own;' and all must agree that neglect to provide for himself, is at least equally reprehensible. By the honest and industrious pursuit of gain, we avoid the numerous evils incident to idleness, that daughter of folly, sister of vice, and mother of misfortune, as an eastern writer beautifully expresses himself. Our present are not our only wants: when disease and old age assail us, we are no longer able to toil, and must lie down in misery and want, or become burdensome to others, if in the season of health and youth we have neglected to lay up for the future. It is consequently manifest that we sin against others, as well as ourselves, if we fail to acquire property, or the means of a comfortable subsistence now, and for the day when we can no longer labour. As to the pursuit of innocent pleasures, it may be remarked, that as they refresh the mind, and enable it to renew with undiminished interest its various occupations, it is but a means of more effectually discharging our duties, and consequently becomes itself a duty. What merit has the solitary, who knows life only as a scene of gloom, or who shuns it as being full of criminal pleasures, abandoning society lest he may possibly be betrayed into a guilty participation of them? Such a disposition is a disease, fatal to the happiness of its possessor, and may prove extremely injurious to society at large.

Most of the pleasures of life are essentially innocent; it is their abuse that renders them vices; and he is the soundest philosopher, as well as the best moralist, and truest christian, who, amidst the toils and temptations of life, cheers his heart, and renovates his mind, by the moderate use of all the blessings and innocent gayeties which appertain to it.

We are now to advert, in the second place, to that class of duties which we owe to our fellow creatures; which, as we have stated, are either absolute, that is obligatory on all men, at all times, and independently of all human institutions; or hypothetical, that is, consequent on the establishment of society and its various regulations, though they are not the mere offspring of positive enactments, but are founded on the condition of man in general.

The absolute duties and rights of man have been heretofore sufficiently explained; and those hypothetically enjoined, have also been remarked on. We have here only to state, as illustrative of this latter class of duties, that as nature does not actually institute property, and as it does not necessarily arise from society and laws, since property may exist independently of them, and they may also exist without property, the right of property, and the duties appertaining thereto, are said to be hypothetical. After property has been established, the rights and duties which respect it, are protected by the law of nature; but these rights and duties are not absolute, for the reason just given. They are moreover to be distinguished from rights merely positive or legal; for duties hypothetically enjoined by the law of nature, are such as cannot have an actual existence in a state of nature, though they are entirely consonant to the design of nature. In fine, hypothetical duties, though different from those which arise merely out of, and which are sustained only by positive civil laws, may, however, be referred to both sources, in the same way as absolute

duties, which are often the subjects of direct legislation in all policed communities.

We have now concluded the view we designed of the Natural State of Man, and the rights and obligations appertaining to it; of the origin of the Civil State, and its fitness to promote the great design of nature, the happiness and dignity of man; and lastly, of the just influence of the laws of nature on man, after the establishment of political society and laws.

This terminates our inquiry into ethical and metaphysical jurisprudence.

In the ensuing lecture I shall treat of the nature of the Political and Civil states; of a Constitution; and of the various Forms of Government in ancient and modern times: after which I shall draw your attention, in a few lectures, to a system of polity, not only very peculiar in itself, but immediately connected with, and indeed originative of, that large portion of English jurisprudence called the Common Law. I allude to the Feudal system, a form of government which pervaded Europe during many centuries, and the remains of which will probably endure as long as time. We are pleased at the prospect of soon arriving on solid ground, hoping, however, that the foregoing casuistical and metaphysical prelections have not been useless, either in recalling your attention to what you may have previously read on those topicks, or in awakening it to the necessity of deeper research into many points which have been so learnedly and cunningly discussed by some of the writers on natural law.

LECTURE IX.

OF POLITICAL, AS DISTINGUISHED FROM CIVIL LAW; AND OF
THE VARIOUS FORMS OF CIVIL GOVERNMENT.

(1.) Of Political Law, what it is, and how distinguished from Civil Law. Political State, how different from Civil State.

THE regulations by which nations aim to secure their order and good government, are divisible into two great classes: the one comprehending those rules which concern the body of the nation itself, its form of government, and the manner in which the publick authority is partitioned; all of which fundamental rules constitute what are denominated the Political Laws: the other embracing those which concern the conduct of citizens among themselves, or towards the state; and these are called the Civil Laws. Corresponding to these two classes or systems of law, there are certain fictitious entities resulting from these distinct kinds of laws, and which have taken the names of Political and Civil States.

In defining and distinguishing these states, the one from the other, Montesquieu (not with strict propriety, we think,) has chosen to adopt Gravina's definitions.

According to Gravina, 'the conjunction of the particular *forces* of individuals constitutes the political state; whilst the conjunction of the *wills* of those individuals forms the civil state.' These definitions we think are somewhat objectionable.

It may be admitted that the prominent features which mark these two states, are, as Gravina and Montesquieu

have stated, viz. that the one refers to the executive, or united forces of the members of a community; the other to the legislative, or united wills of those individuals. But we apprehend that this is not going sufficiently far. The political state must be considered as co-extensive with the political laws, and the civil state with the civil laws. Now the political and civil laws often relate to matters which do not exclusively regard the joint force, or the joint will. By political laws we are to understand, not merely such as relate to the joint force, but all those which relate to the organization and conduct of the body politic; those fundamental and constitutional laws which direct the nation, as far as they are not embraced by a distinct branch of laws, called the laws of nations, and which regulate international communion. Political laws, therefore, may relate indiscriminately to matters of executive, legislative and judicial conduct. Those laws which give rise to the form and constitution of government, and those which establish the obligations of a community, and of its publick functionaries, constitute a part of the political state; yet many of them may have no relation whatever to the wielding of the united forces. So, again, the constitution itself may establish many things expressive of the united will only, and yet these would be classed with the political laws, and properly, because they establish the relation between the body politic and the members of which it is composed; whereas civil laws relate to the conduct of citizens towards each other, and of the citizen towards the state.

The political state, therefore, must result from the whole of the political laws, and not merely, as Gravina says, from such as establish the duties and rights of the body politic in relation to the joint force. So, likewise, the civil state must, we apprehend, be commensurate with the civil laws; and though some of these laws may define obligations due by the citizen to the state, as in the payment of taxes,

duties, &c. yet these are as much civil laws, and as much regard the civil state, as those which relate to the rights and duties between citizen and citizen. From the whole, then, it would appear that the meaning applied by these two eminent political philosophers to the expressions 'political state,' and 'civil state,' is too restricted, and that they are coextensive with those two species of laws.

(2.) Of the exercise of governmental power, relative or not to the constitutional and fundamental laws of a state: Of the nature and objects of a Constitution, and how affected by the physical condition of the governed: And of the necessity of laws varying with the great and radical changes in the genius of a people.

The fundamental regulations which determine the manner of executing the publick authority, and which define the relation between the political body and its members, are what form the Constitution of a state. These point out and fix the limits of authority, whether legislative, executive or judicial: they determine in what functionaries it is to be reposed; in what manner it is to be exercised; and to what subjects it is to extend. In the language of Vattel, 'a constitution is in fact nothing more than the establishment of the order in which a nation proposes to labour in common, for obtaining those advantages with a view to which the political society was founded.'*

It is somewhat surprising that although government be the most important and admirable of all sciences, it has been the least perfectly understood, and, in regard to its actual exercise, is yet far from perfection. A subject which has called forth the best exertions of some of the master geniuses of antiquity, as Plato, Aristotle, Socrates, Cicero &c., and the persevering thought and research of many distinguished moderns, as Bacon, More, Locke, Sidney, Harrington, Montesquieu, Machiavel and others, nevertheless remained, almost to our own days, confes-

* Vattel's Law of Nations, Book I, ch. 3.

sedly in its infancy, especially as a practical science. The great *desideratum*, however, which is to be now attained, is not so much the science as the art of true government. The philosophy of political rule is in this age much better understood than in any preceding; but, like many theoretical improvements in regard to man's intellectual and physical condition, it is slow in being reduced to practice, and must be ripened and matured by the gradual influence of times and circumstances, and the growing virtues and intelligence, no less of the people, than of those in power, before its excellences are fully perceived and practised. It is, indeed, wonderful at first view, that of a subject in which men's happiness is so largely involved, even the first principles should have so long remained either wholly unknown, or greatly obscured; and that, after so many thousand experiments, some forms should not have been decided on as the best, and been very generally adopted.

Were we to allow the variety of existing and past forms and constitutions of government, to argue the sentiments of mankind in regard to this subject, we might suppose those sentiments to be, indeed, infinitely various. But widely different as their practice has been, it is to be remembered that the lust of power has left to few people the free expression of their choice; that necessity has created a thousand systems of rule, which philosophy and common sense see the propriety of reforming, while circumstances, and 'custom grown blind with age,' render change dangerous, or perhaps impossible. We should also remember that of existing systems of polity, most have been brought to subserve the interests of the people only by dint of innumerable efforts and contrivances, which have assaulted or mined the citadel of power; and that when nations start from so many different points, even if they always held in view the same end, they would naturally stop short at different stages of their progress, either from ignorance of

their road, or from the obstacles which impede it. Thus, then, if even the same species of government would suit all people alike, there are obvious causes in the actual circumstances of mankind, why they should differ so greatly in their modes of political rule.

Among the circumstances which have been supposed to exercise a powerful control over the forms of government, the varieties in the moral and physical condition of man have been often mentioned. Nations, like individuals, have their temperaments, which give rise to correspondent systems of government and laws. So, also, with nations as with individuals, the mere accidents of life give a direction to their future destiny. War, trade, agriculture, science or ignorance, according as they form the particular object or condition of a community, will render one form of government more likely to occur, and more suitable to their condition and inclinations, than another, since the promptitude and vigour which characterize a monarchy, for example, are very proper for an ambitious or warlike people, while they are actually detrimental to the views, and inconsistent with the spirit of a nation devoted to traffick. Great Britain furnishes no exception to this doctrine. She is commercial, and, in a degree, warlike; but neither is her government a monarchy, nor can it be regarded as ambitious: her predominant spirit is rather mercantile than warlike; and her government, both in theory and practice, much more republican than monarchical, or even aristocratic. So far, indeed, from that country forming an exception to the doctrine we have stated, it appears to us that no stronger example can well be given of a nation whose government and laws have more strictly conformed to the spirit of her people, and varied with the different temperaments which circumstances have occasioned through the lapse of ages. Every feature in her constitution and laws seems promotive of her natural tendency towards a limited

warlike spirit, a limited ambition, and a thirst for trade and commerce which knows no bounds.

Hence, however sages may agree as to the most proper and virtuous pursuits of a nation, we may discover in what we have stated, a powerful cause of the great variety of choice and opinion exhibited by communities in their forms of government; since they naturally fall into that form which corresponds to their particular dispositions and manners; to say nothing of those to which their ill fortune reduces them, when luxury or vice or ignorance has rendered them incapable of publick spirit, and made them prone to an indolent subservience to accidental rule.

In every policed community there are three powers or authorities necessary to its constitution and preservation, viz. the power of making laws, that of interpreting them, and that of executing, or appointing those who execute them. These are commonly termed the Legislative, Judicial and Executive authorities. Aristotle denominates that branch the appointing power, which we term the executive; and, as his commentator remarks, 'with propriety, inasmuch as it is generally a very small part of the duty of that member of the government to see to the immediate execution of laws, its prerogative being chiefly in appointing those who do.'*

Now, whenever a state departs from that simple modification of government which unites all these powers in one person or body; when it distributes them among different individuals or bodies, with a view to save them from abuse; we at once perceive how the forms of government may be infinitely varied, although the aim and spirit of all may indeed be essentially the same. Athens, Carthage, Rome, Venice, and the confederated states of America; all republics, all jealous of liberty; how different the distribution

* 2 Gill. Aris. Poli. Lib. 6. c. 15, p. 215.

which they made of their powers, in order to preserve something like a balance, and to prevent abuse or encroachments in any! These ancient states have shown us a truth equally clear and melancholy; that while a sound spirit and good morals may preserve the worst forms of rule from the evils of which they are naturally productive, the best have been unable to save the community, when the springs of the machine were weakened by vice, and impeded by corruption. Such, then, are the chief causes which have produced the infinite variety of governments among mankind.

It would be difficult, perhaps impracticable, to decide to what degree all nations are capable of a more extended liberty than they have for the most part enjoyed: whether, in short, the perfectibility of man, (to use a modern phrase and idea,) will ever be so sufficiently and practically demonstrated, that the people would every where be benefited by being allowed a voice in the government. Strange that they should not! since the institution of all government and laws was for their sake. Strange, indeed, is it that what is so manifest in theory, should be so often false in practice! Whether it is that their governments debase them, or that, as has been often seriously contended, they require base and absurd governments, certain it is that the scheme of political rule to which they have in almost all ages and countries submitted, and still more the unhappy use which they have so often made of their natural and political rights, have cast a doubt on a question which, on abstract principles, will admit of none. But leaving this question to the solution of the present or approaching times, our business is to contemplate for a moment, the adaptation of governments to the actual circumstances of a people, their predominant spirit or character, and the radical mutations which they undergo. That the philosophical, but too generalizing author of the 'Spirit of Laws' has carried his principle on

this topick a good deal too far, cannot be doubted, even by his most zealous admirers.

That nations, as we actually find them, are very differently fitted for the enjoyment of a free polity, is too abundantly manifest from all past and present experience. That climate, habits, pursuits, customs, and all the varieties of education, whether moral, physical or intellectual, are circumstances which impart to nations, as well as individuals, a certain temper more or less adapted to a liberal government, cannot be questioned. Yet these may so counter-vail and equipoise each other in all places, that although we allow them much consideration, yet when we find the enlightened author of the 'Spirit of Laws' excluding from the possibility of free institutions, all nations inhabiting warm and luxurious climates, and basing his opinion on the *relaxed state of their fibres*, and the circumstance of *bread procured without labour*, we can scarce repress a smile, especially when we find him acknowledging, in his aphoristical manner, that while, on the one hand, the delicacy of their organs makes them dread labour and death, it imparts an imagination so lively, that they shun a thousand things more than either labour or death. It is strange that the spirit of theory should mislead so close a reasoner, and so profound a thinker; and that one who sought with earnestness for every operative cause, should yet erect so vast a structure on so slender a foundation. Does not the character of the Arab tribes, dwelling under a burning sun, and yet free; and that of the Tartar tribes, inhabiting the frigid and barren table lands of Asia, and yet slaves; show us conclusively how uncertain are his broad deductions from climate? Undoubtedly legislators have their peculiar difficulties in all climates and countries, arising, too, from causes peculiar to those countries and climates. Still, however, these physical circumstances are very secondary, and far from invincible. It seems, therefore, but philosophical, and

conformable to all experience, to allow that moral causes are the controlling ones, and that these may be made to operate in all countries; and consequently that nature (however opposed the dispositions of her sons in all places may be to the dominion of reason, and of just government) has left none of them hopeless of a free and rational policy.

The just conclusion from what we have said on this subject seems to amount to this; that the moral circumstances in which a legislator finds his people, should mainly direct him in the adaptation of his government and laws to their necessities; and that while physical circumstances ought not to be disregarded, they can never be a perpetual barrier to institutions either free or despotick. On this point philosophy and history concur; for we know that in the hottest climates men are neither without industry, nor destitute of spirit, and that the remark of Montesquieu in regard to such a climate, that 'slavery is more supportable than the force and vigour of mind necessary for human action,' is far from being justified by history. So, also, in the most fertile regions, property may be so divided and regulated that labour shall always be requisite for a comfortable subsistence; whilst in the most barbarous, religion, as it is good or bad, may soften and humanize, or subject to servility and sloth. In the free and but half civilized nations, which arose on the ruins of Rome, superstition produced slaves to a spiritual father, and peopled convents with indolent fanaticks; but that this superstition and its effects did not spring from physical causes, is too manifest to be doubted for a moment. Innumerable circumstances, in fact, combine to form the character of a nation; and of these it is the policy of wise legislators to poise some against others, in the confidence that nature has every where provided her antidotes. One thing is obvious enough, that to apply to all nations indiscriminately even the form of government abstractly the best, would be a wild and

fatal policy. A republick in Hindostan, for example, excites by its very mention an emotion of ridicule, since, if at once established, it could be nothing but anarchy among a people to whom nearly all just principles of government are unknown, and who, from an immemorial æra, have been slaves. To establish a complete despotism in Christendom would also be next to impossible; because, remote as too many of the European polities certainly are from just principles of rule, they are yet sensible enough of the rights of the people, however unable the people may be to assert them fully. So, again, a nation ambitious of conquest would be very injudicious to select a republican system, which is not fitted for offensive efforts, and is but too happy to be capable always of those which are only defensive. If, on the other hand, the people be frugal and content with little; if there be among them no excessive inequality of estates; they will be likely to love and preserve republican institutions; while, again, too great a scantiness of food, or a wandering and hunting life, will be apt to divide them into tribes, and subject them to the conduct of petty rulers. If wealth and its consequent power be in few hands, as in feudal times, a republican constitution would be practically impossible; for who are to preserve rights to a people who are themselves incapable to assert them? It is only the dream of political enthusiasts that has found in *Magna Charta* a bill of rights for a people who had only a notional existence. It was, on the contrary, a grant of privileges to a powerful, and therefore turbulent aristocracy. In the history of Venice we find these truths practically illustrated. For more than two and a half centuries, that country was governed by a pure democracy: this was in its infancy. During many more centuries, a powerful aristocracy held dominion, and sometimes respected the people; and often a wicked oligarchy was entirely triumphant, and wholly disregarded their claims.

At other times we find the Doge all powerful, and the Senate and Council his subservient instruments; again, the Doge sunk into insignificance, and the oligarchy were dominant. In all these various mutations we find, (after a close inspection into their history) that wealth generated an abundant harvest of its peculiar political evils; whilst trade and commerce, being in the hands of all, not only banished the spirit of war and conquest, but so diffused the means of education, and of at least comfortable subsistence, that the people were of sufficient importance to have their civil liberties generally respected, and their political liberty often acknowledged, sometimes in substance, but more frequently in form only. The influence of wealth and noble ancestry was at all times very great in Venice; but the inferior orders, being neither very poor nor ignorant, were not fit subjects for slaves. During the whole history of this remarkable nation, at least during a period of more than fourteen centuries, the national independence was preserved in its integrity, and the people were free from foreign oppression. Neither the Guelphs nor Ghibellines were sufficiently powerful to destroy her political independence: the Vatican thundered, yet the Doge and the people were calm: surrounding nations envied yet feared. Venice, which professed to be ruled mainly for the publick good, though often disturbed by intestine broils, chiefly about the succession to the Doge, (which, however, were rather individual contests than civil wars,) enjoyed for ages an almost unexampled prosperity, which excited the admiration of the world, and is still regarded by some politicians as a problem of no easy solution in the science of political rule. The truth is, however, that these changes were the natural and inevitable result of man's moral nature, when subjected to powerful impulses. Venice commenced her infant career under the influence of two principles which were long preserved, and never

wholly abandoned; to respect the rights of the governed, and neither to meddle with the concerns of other nations, nor suffer them to interfere with hers. Her commerce grew out of circumstances; and wealth and time created a powerful and venerated aristocracy. Luxury and the ambition of power will corrupt, and an odious oligarchy necessarily ensued; the people, too powerful to be enslaved, would struggle for their rights; and thus various changes in the form of government arose. The early respect for the people, and the hatred of monarchy, would for ever prevent its open establishment; whilst an increase in the population manifested the impracticability of continuing that pure democracy with which the state commenced its career. Thus was it that in the history of this interesting people we find, in substance at least, nearly every form of government exemplified, viz. pure and simple, pure and mixed, corrupt and simple, corrupt and mixed; in fact, democracy and ochlocracy, monarchy and tyranny, aristocracy and oligarchy; and also various combinations of each. From this it appears that forms of government and constitutions may, under the same climate, easily vary according to the changing conditions of a people; and that they all take their rise chiefly from adequate moral causes, and may often be proper, and best suited to the particular state or condition of a people. It is also a principle not to be lost sight of by legislators, that a very operative cause in the production of national character itself, is to be found in the very form and constitution of the government; for who can doubt that long subjection produces and strengthens the spirit of slavery; or that the privilege of freedom will originate and perpetuate a zeal for its preservation, and develope the best means of guarding it?

Although the illustrious author of the 'Spirit of Laws' was not insensible to this principle, he has not sufficiently regarded it in his considerations on the causes of slavery in

Asia. The force of government in changing the spirit of a people, is made sufficiently obvious by contrasting the ancient inhabitants of Asia Minor and Greece, with its modern possessors. The same physical circumstances are now operative as then; with Byron we may say,

‘Yet are their skies as blue, their crags as wild,
Sweet are their groves, and verdant are their fields;
Their olive ripe, as when Minerva smil’d.’

Change is the fate of nations; and the great variety of its sources is among the infinite reasons why all the policy of the wise has never been adequate to prevent it.

Having explained, in a general way, first, the nature and object of a constitution; and secondly, how far the laws should be relative to the particular genius or character of a people; let us, thirdly, bestow a few words on the necessity of varying the constitution and laws, to suit the radical changes which often take place in the dispositions of a people, from the gradual developement and expansion of their energies, or from various other causes. This change, auspicious to nations in their progress to refinement, as it is fatal in the periods of their decline, often renders the forms of polity which were suitable to their infancy, or to any given state, not only insufficient but intolerable in another. The feudal system, the unavoidable growth of the circumstances of the times, and the situation both of the conquerors and the conquered, impressed a character on the constitutions which arose out of it, which has been the germ of the fiercest dissensions during several ages. It is true that changes have been wrought, but they have either been the fruit of formidable strife, or the result of bungling evasions which have made the best constitutions of Europe somewhat clumsy in their structure, and the text of very opposite constructions to discordant interests and passions. You will have occasion to remark in the history of the English Common Law, the truth of

what has been just stated. You will there perceive the changes which, becoming necessary from the increasing importance of the people, converted a feudal aristocracy, whose king was no more than a powerful peer of the rest, into a government worthy of a free people. But you will likewise see that they have left the structure, convenient as it must be confessed to be in most essential respects, neither very symmetrical, nor always very judicious to a philosophical eye. How many calamities had been spared to the British nation, had the Stuarts been sensible enough of the necessity of accommodating government to the advancing refinement, liberal thought, avidity of freedom, and strength to assert it, which sometimes grow up with the growth of nations, and which, though they be not a resistless torrent, will most certainly in time end in the correction, if not the total abolishment, of all arbitrary systems. In no period which history displays to us, is the force of this doctrine more strongly unfolding itself, than in the present age, and at this very time. The georgicks of the mind have become, comparatively, so universal and enlightening, as to have conferred a power on the people which must be heard and respected. Neither the stratagems nor the force of rulers, nor the remains of former habits in the people, can check this march of freedom: the mind, redeemed and regenerated, must triumph over the artifices of tyranny, in whatever form they may appear; and publick opinion will in all countries establish the truth, that governments and laws were instituted to make the people happy, and not to make the rulers distinguished and powerful.

It is a most important question, (not indeed to us, for we have settled it) in whom do the right and the power of making necessary and radical changes in government reside? That it is in the people, we, as republicans, assert of course; nor can we be made well to understand on what

sensible grounds it has ever been denied. Those which have been taken are very various, but need not be stated, as we have already, in a previous lecture, said all perhaps that is requisite. We would remark, however, that it is asserted by many republican writers, that government is founded on a contract between the rulers and the ruled; the first undertaking the care of rule, in consideration of the honour and advantages of the station; the other undertaking to obey, in consideration of the preservation by these rulers, of safety and good order. This, however, is not exactly in coincidence with the doctrine of the American people; they look on the body politic, that is, the people, as the master, and the rulers as the servants of the people; servants amenable to censure, subject to be displaced, and possessing no rights which can set them above the correction of the state. The legislative, executive and judicial bodies, therefore, are not with us the repositories of the sovereign power: this resides essentially in the people. Under the British constitution, on the other hand, the sovereignty of the nation is supposed to reside in the legislature, composed of King, Lords and Commons: supreme power and legislative power being there convertible terms. There can be no doubt, however, that the legislative power may reside in one body, whilst the *jus summi imperii*, or sovereignty, remains with the people.* This, in effect, is the case even in England, and indeed in every other nation. It may not be recognized, and the right may remain dormant for ages; but when oppression of the people becomes open, and threatens to invade important rights which had been previously respected, the people are never backward in maintaining, at any sacrifice, the important truth, that they are supreme, and that all others are but their functionaries, whose authority ema-

* 2 Ruth. Inst. 115 &c. 1 Tuck. Black. Appen. note A.

nated from the people, and may be resumed whenever these become satisfied of the thorough unworthiness of their agents, and the radical injustice or impolicy of vesting in them the powers which they claim to exercise.

The history of every nation on earth proves that this doctrine has been asserted and vindicated by the people, whenever a strong and fitting occasion arose to demand its enforcement. It is a melancholy truth, however, that whole nations, as well as a host of misguided authors, have at different times, and in various nations, maintained with great zeal that kings are accountable for the exercise of their powers to no one but God; that they are his vicegerents; and that to oppose them is to raise a sacrilegious hand against the Most High. This doctrine found a distinguished champion in Sir Robert Filmer, who infers the *jure divino* sovereignty of kings from the power given to our common progenitor Adam, who, as he contends, was an absolute monarch! He is further of opinion, that no man is born free, or ever can be free, except the king; and that sovereignty has been regularly transmitted from Adam through all the various monarchs who have succeeded, in all nations, and at all times! The celebrated Locke has devoted a considerable portion of his *Treatise of Government* to the refutation of this unjust and truly absurd doctrine. So prevalent, at one time, was this notion of the divine right of kings, that even the homilies of the church strenuously maintained it; and Archb. Tillotson, good and learned as he was, contends for it with much zeal, in his well known letter to Lord Russell. Others of equal piety have urged passive obedience, no less as a christian than as a political virtue. The opinion that governmental power flows from the people was considered, even so late as the year 1683, as so abominable a doctrine, that it was publicly condemned as such by the Oxford decree.

It is pleasing to find, however, that not only the British nation, but those of nearly all Christendom, have of late manifested more respect for the rights of the people. An infinitude of causes is gradually, and, in some countries, silently operating, to enlighten the general mind on the subject of the relation which ought to subsist between the people and their rulers; and though the doctrine gains ground but slowly in many countries, there are strong indications that the day may come when all mankind will acknowledge and practise it.

This happy condition of things, unfortunately, has not yet been more than feebly manifested, in a very few nations. But the friend of man can clearly perceive in the actual state of the world at this time, more combining causes, more auspicious promises, more powerful and unerring principles in operation, to produce this meliorated condition of man, than the history of the world has furnished at any previous period. But, to leave this digression, let us resume for a moment longer our inquiry into the people's right. The power of reforming the constitution, of suggesting and enforcing changes in the government and laws, suited to the change of times and circumstances, must belong essentially to the people, who are to be mainly affected by them. They, and they only, should decide how far it is expedient to retain old principles, or politick to adopt new ones. What an absurdity were it to imagine that a state whose whole aspect was altered, whose pursuits were changed, whose transactions with other states were multiplied, whose occupations had become infinitely various, whose knowledge was vastly augmented, and whose manners partook of the general melioration, should nevertheless be compelled to abide by the ancient institutions, which only the early simplicity of manners and affairs had rendered proper, and which were no longer adequate to the exigencies of the times, or the enlarged views

of the people. Indubitable in theory as is the necessity for the laws to keep pace with the growing spirit of the age, there is nothing which in practice has been so little regarded. Change is stigmatized as innovation, which to many is only another name for trespass on hallowed ground. The lust of power, and an unwillingness that the deep lines which separate the people from their rulers, should be rendered less visible, added to a dread that the ancient halo which encompasses those in high places should be dispelled, and subjects know how much their rulers are in truth indebted to them; all these, I say, are continually repressing the spirit of improvement, and keeping the people either ignorant of their rights, or unable to assert them.

But this right, however manifest, or wherever it may reside, is one which should be exercised in all nations, and under all circumstances, with the profoundest discretion, and the best of tempers. It is a power which the people, (or whatever other organ may possess it,) should resort to with a becoming veneration for existing laws, and the fullest conviction of the necessity of change. A wholesome jealousy of innovation is essential, lest we rush into vain or impracticable experiments, in the light hope of obtaining something better, and also lest, under the guise of salutary reform, ambition or anarchy should lurk, and the worst passions of our nature be eventually set loose upon society. That great caution, in fine, is necessary in this respect, further appears from the fact, that one of the strongest arguments opposed by tyranny against all innovations, has been drawn from the rashness and ignorance which have so often accompanied attempts at reform.

(3.) Of the various Forms of government, and *first*, how Form of government differs from a Constitution. *Secondly*, of the influence We are now to examine into the different Forms of government which various nations have selected: also, into the opinions of some eminent legislators and philosophers of antiquity, and of modern

of government on individual and national character. *Thirdly*, various divisions of the forms of government, and herein of the divisions of Plato, Socrates, Aristotle, Machiavel, Polybius, Cicero and others, and of the opinions of various ancient and modern legislators and philosophers as to actual and ideal forms of government.

times, as to the best form of government; and their views on this subject, as set forth in their political romances, and other writings.

A Form of government differs from a Constitution. All nations must have the former, but need not have the latter, unless, indeed, the very form be itself regarded as a fundamental or constitutional doctrine, which can scarcely be the case, and, if it were, would still not come up to the idea of a constitution, as it is understood by people generally, and especially by political philosophers. A form of government, in the language of Vattel, 'is understood to refer to the distribution of the powers of legislation and administration, and to denote whether those powers are accumulated in one person, or variously distributed among several individuals or bodies. The term constitution goes further, and includes also the particular regulations which prevail respecting the manner in which these powers are to be exercised.' Hence, different countries may have the same form of government, but different constitutions; but if they have the same constitution, they necessarily have the same form of government.

The word 'constitution' is also frequently used to denote either the written instrument which defines the relation between the governed and their rulers, and the rights and duties of each, as, for example, the constitution of the United States, those of the several states, &c: or that body of usages existing from time immemorial in the memories of men, or in scattered documents, as is the case with the British constitution, and indeed with what are called the fundamental laws of every nation whose government is not absolutely despotick.

Forms of government, thus understood, though extremely various in consequence of the modifications which they receive from the admixture of the different simple forms, are yet susceptible of classification, and have been classified by writers and philosophers from the earliest antiquity, whilst the constitutions establishing them must necessarily be incapable of such a classification.

We are also to distinguish the form and constitution from what Montesquieu calls the Principle of a government. The former are those by which the government is constituted; the latter is that by which it is made to act. 'One is its particular structure; the other the passions which set it in motion.'*

Some affectation has been manifested by writers on this subject of the 'principles of government,' both before and subsequent to Montesquieu, who, though the first to speak with philosophical clearness on this matter, is by no means the first or only one who understood it. These principles of government, whether they be those of authority or of power, have been anxiously sought after by the political philosophers of all ages of the world. What are called the Principles of Authority, are said to be the cardinal virtues, prudence, justice, temperance and fortitude; and the governmental Principles of Power are said to be certain goods of fortune, as knowledge, riches, ancestry, policy, reputation &c. &c. These principles have been variously applied, both in practice and theory; and legislators and philosophers have built on them their real or fictitious systems of government.

Ancient and modern times furnish several examples of distinguished lawgivers and philosophers who have displayed, in practice or theory, what they esteemed the most perfect models of human government. It will be our ob-

* Montes. Sp. Laws, Book 3, chap. 1.

ject, in a summary way, to inform the student who most of these legislators and philosophers were, and what were their principal doctrines on the subject of political philosophy; and to give a brief analysis of some of their works, more particularly those on the ideal politics, or the supposed best forms of human government.

The Legislators of antiquity, of most note, were Moses, Minos, Zaleucus, Charondas, Lycurgus, Solon, Romulus, Numa, Draco, Pittacus, Zoroaster and Confucius, some of whose laws and institutions have been preserved, and excite both esteem and pity, since they generally display a singular combination of philosophical acumen, and surprising ignorance and superstition.

The Philosophers of most note among the ancients, for the cultivation of political science, were Plato, Aristotle, Cicero, Socrates and Polybius, the writings of the three first of whom have come to our day in a nearly perfect state.

The legislators of modern times who have been distinguished, are the Emperor Justinian, Timour the Tartar, Alfred the Great, Edward the Confessor, Edward I. of England, Peter the Great, of Russia, Frederick the Great, of Prussia, and the Emperor Napoleon. All these had laws and a scheme of policy which have illustrated their names in a greater or less degree; and most of them have shed useful light on the science and art of government.

The philosophers of modern days whose views of philosophical legislation are most worthy of remark, are Machiavel, Sidney, More, Bacon, Locke, Milton, Harrington, Montesquieu and Hume; to whom we may with great propriety add our own distinguished countrymen, the authors of the Federalist, and John Adams.

Some of these philosophers, ancient and modern, have chosen to convey their opinions on the science of politics by presenting a *beau ideal*, or imaginary perfect govern-

ment. Such is the 'Republic' of Plato, the 'Prince' of Machiavel, the 'Utopia' of Sir Thomas More, and the 'Oceana' of Harrington. Besides these, we may mention the 'Cyropædia' of Xenophon, the 'Travels of Cyrus' by the Chevalier Ramsay, the 'Idea of a Patriot King' by Bolingbroke, 'The Adventures of Gaudenzio di Lucca,' and perhaps the 'Travels of Gulliver.'

We propose to bestow some consideration on the doctrines and lives of several of these ancient and modern legislators and philosophers; and first,

OF PLATO'S VIEWS OF GOVERNMENT. As the works of Plato are voluminous, and in this country are seldom to be found except in the hands of veteran students, it may be well to explain of what they consist, before we proceed to speak of his opinions. An enumeration of all the works of this eminent philosopher, with their names and extent, may invite the student, through curiosity or a more worthy motive, to a further acquaintance with them than what may be gleaned from the sketch here given.

The whole of Plato's works, then, are contained in fifty-five Dialogues and twelve Epistles. Hermodorus however, in his collection, makes only thirty-five dialogues, but gives thirteen epistles. The reason of this variance may be, that there is some doubt whether some of the dialogues be not the production of one or more of his distinguished pupils, as is certainly the fact with the dialogue called 'Epinomis.' Each of the dialogues is designated by a short and pithy name, such as 'De Politicō,' 'De Republicâ,' 'De Legibus.' His works may be divided into four classes, viz. Physical, Logical, Ethical and Political. The treatise 'De Republicâ' is not properly a dialogue, as the whole is recited by Socrates; but he details the opinions of the other supposed interlocutors. As the writings of Plato may now be studied by those who are not deeply versed in the Greek and Latin languages, they having re-

cently assumed an English garb, any one may now speak of them with a familiarity which a few only could formerly have possessed. And, indeed, were scholars in those languages more frequent, and even much addicted to their perusal, still they would not be justified in disregarding the laborious researches of such translators as Taylor and Sydenham, who devoted much time and deep investigation, to attain a thorough knowledge of their author. Nine of the dialogues were translated by Sydenham, and the remainder, together with the epistles, by Taylor; and the whole, with learned annotations, were published in 1803, in five quarto volumes. The works of Plato being often referred to on subjects of natural and political jurisprudence and ethicks, we shall present to the student the names of all of them, together with the volume and page in which they may be found in the translations of Taylor and Sydenham. We would previously observe however, if it be not sinning against all authority, that after a pretty careful examination of his works, mainly, we confess, through the aid furnished us by Taylor and others, we are strongly inclined to the opinion that the wisdom, learning and acumen of the divine Plato have been greatly overrated. It appears to us that there is much of wordy jargon, inexplicable subtlety, and occult and useless learning; often combined, indeed, with bold and striking thoughts, close and deep reasoning, and numerous apothegms and aphorisms of truth and wisdom. The prevailing character, however, of his works is mysticism, symbolical and incomprehensible physicks, logical cant, acroamatick speculations, and still more acroamatick words and terms, perhaps at no time fully comprehended by his disciples, or by his readers in after ages, and possibly as little understood by himself. His imagination was certainly brilliant, and his eloquence of the highest order; but that his wisdom was not proof against the affectation and pe-

dantry of his age, is abundantly manifest throughout his writings, in the various fantastical notions and sublime nothings which a philosopher of the present age would utterly repudiate. On the whole, therefore, we cannot doubt that the age of Platonism is forever past; and that the remark of Dionysius on another occasion may be correctly applied to much of the philosophy of this greatly distinguished man, viz that many of the notions are ‘Verba otiosorum senum ad imperitos juvenes.’ And though the wise and learned and aged of many nations and times have sought instruction in the pages of the divine Plato, much of this must be ascribed to circumstances which have perhaps entirely passed away, and can never recur. These we need not enumerate, as they will readily suggest themselves to the mind of a student tolerably acquainted with the progress of human knowledge, from the days of Plato to the dark ages, and from the revival of literature to the eighteenth century, when the present philosophy of matter and mind became fully established. But, parting with what may be considered too digressive, we shall now present the promised list of Plato’s writings.

List of Plato’s writings, as contained in Taylor’s edition, in five volumes, quarto, translated into English by him and Sydenham, with annotations &c.


DIALOGUES.

VOLUME FIRST.

- | | | |
|----------|--------------------------|---------------|
| No. 1. | ‘The First Alcibiades.’ | PAGE 9 to 98 |
| 2 to 10. | ‘The Republic’—Ten Books | |
| | or Dialogues. | - - 99 to 478 |

VOLUME SECOND.

- | | | |
|-----------|---------------------------------|----------------|
| 11 to 23. | ‘The Laws’—Twelve Dia- | |
| | logues. | - - - 1 to 384 |
| 24. | ‘Epinomis, or the Philosopher.’ | 385 to 414 |

 This dialogue is supposed by Diogenes Laertius to be the production of one of his disciples.

No. 25.	'The Timæus.'	-	-	-	414 to 575
26.	'The Critias, or Atlanticus.'	-	-	-	575 to 593

VOLUME THIRD.


27.	'The Parmenides.'	-	-	-	1 to 201
28.	'The Sophista.'	-	-	-	202 to 283
29.	'The Phædrus.'	-	-	-	283 to 373
30.	'The Greater Hippias.'	-	-	-	373 to 429
31.	'The Banquet.'	-	-	-	429 to 531

VOLUME FOURTH.

32.	'The Theæteus.'	-	-	-	1 to 99
33.	'The Politicus.'	-	-	-	100 to 175
34.	'The Minos.'	-	-	-	175 to 193
35.	'The Apology of Socrates.'	-	-	-	193 to 229
36.	'The Crito.'	-	-	-	229 to 245
37.	'The Phædo.'	-	-	-	245 to 343
38.	'The Gorgias.'	-	-	-	343 to 461
39.	'The Philebus.'	-	-	-	461 to 571
40.	'The Second Alcibiades.'	-	-	-	571 to 575

VOLUME FIFTH.

41.	'Euthyphra.'	-	-	-	1 to 27
42.	'The Meno.'	-	-	-	28 to 101
43.	'Protagoras.'	-	-	-	101 to 157
44.	'The Theages.'	-	-	-	157 to 179
45.	'The Laches.'	-	-	-	179 to 211
46.	'The Lysis.'	-	-	-	211 to 239
47.	'The Charmides.'	-	-	-	239 to 269
48.	'The Lesser Hippias.'	-	-	-	269 to 309
49.	'The Euthydemus.'	-	-	-	309 to 355
50.	'The Hipparchus.'	-	-	-	355 to 371
51.	'The Rivals.'	-	-	-	371 to 408
52.	'Menexenus.'	-	-	-	408 to 431
53.	'Clitopho.'	-	-	-	431 to 439
54.	'The Io.'	-	-	-	439 to 489
55.	'The Cratylus.'	-	-	-	489 to 575

 The EPISTLES are twelve in number, and are as follows:

No. 1, 2, 3. Epistles to Dionysius. [These are by some supposed to have been written by Dion, one of his disciples.]

No. 4. Plato to Dion: 5. Dion: to Perdicas. 6. Plato to Hermias and others. 7. Plato to the Kindred of Dion: 8. Plato to the Familiars of Dion: 9. Plato to Archytas. 10. Plato to Aristodorus. 11. Plato to Laodamus. 12. Plato to Archytas.

Having spoken, in a general way, of the works of Plato, let us inquire into some of his opinions and doctrines, more particularly on the subject of government.

In the writings of this 'Prince of ancient philosophers' we find two distinct classifications of the forms of government. One is contained in his dialogue entitled 'The Politicus;' the other in the dialogues called 'The Republic,' but chiefly in the fourth, eighth and ninth dialogues of that work. His opinions generally on the subject of government are also to be found in 'The Timæus' and 'The Minos;' in his twelve dialogues called 'The Laws;' and lastly, in his epistles to Dionysius.

In our examination of Plato's views of government, we shall confine ourselves mainly to his 'Politicus,' and 'Republic;' and first, of his classification of the forms of government as it is displayed in the former of these works. In the Politicus his cardinal divisions are three, viz. as the government is reposed in one, in a few, or in many. His subordinate divisions are six, viz. 1, a government by consent; 2, by force; 3, by the rich; 4, by the poor; 5, according to established laws; and 6, without laws. The cardinal distinctions he thus applies. The government of one he denominates monarchy, which may be of two kinds, viz. that of a king, and that of a tyrant. The government of a few he calls aristocracy, when established and regu-

lated by laws; and oligarchy, when it is corrupt, and subject to no certain laws. The government of many he designates by the general name of democracy, though he says that this is also of two kinds. Hence monarchy, aristocracy and democracy are with him generic words; but when they are corrupt, and are conducted with force, or without laws and true political knowledge, he distinguishes the first by the name of tyranny, the second by that of oligarchy, and to the third he has assigned no special name, but retains the word democracy as applicable indiscriminately to either the pure or the corrupt government of the people. A corrupt democracy has since taken the name of ochlocracy or anarchy.

It appears, then, that Plato in this work enumerates six forms of government, and has given five special names, according as the three elementary and pure forms may assume a new character by abandoning the true principle on which they essentially rest.

We find in the works of Plato some little confusion as to the exact distinction between a king and a tyrant. In 'Epinomis' he appears to regard these words as synonymous, and as meaning nothing more than a single ruler, governing with wisdom and justice. But in his third epistle to Dionysius he clearly alludes to the well known difference, of the one being regulated by law, the other by caprice. So, again, in 'Politicus' he makes the distinction to consist in the one's governing by the consent, the other without the consent of the people; but in the same dialogue he abandons this distinction, and makes kingly government dependent altogether on the wisdom and knowledge with which an individual governs, without reference to the government being one of law or not, of consent or not. There is likewise another distinction between tyranny and regal government, to be found in Plato. *Tyrannos* is made to signify one who has himself acquired the sovereignty of a state formerly free; the governing with prudence or oth-

erwise, making no difference, as it is the manner of acquiring political rule that is alone necessary to make one a tyrant. In this view of the word it differs in no respect from our word 'usurper,' except that usurpation is a word of still more extensive import, and may be predicated of any unjust acquisition of sovereignty, be the state previously enslaved or free.

In the work under consideration, Plato lays down, in substance, the following positions.

1. That the most perfect of all governments is that of a king, because, *ex vî termini*, king means one eminent for probity and wisdom.

2. That if any individual in a nation far exceeds all others in prudence and justice, he is born a king, though he should from circumstances for ever remain a private man.

3. That the government next in the scale of excellence, is an aristocracy, which he says differs in no respect from a regal government, except that the former is by a few, the latter by one.

4. That a democracy, or popular government, is only praiseworthy so long as it continues to be regulated by laws; but that its strong tendency is to corruption, and, consequently, that a good government is only to be expected when sovereign power is exercised by one or a few.

5. That oligarchy, which is a corrupt aristocracy, is much to be reprobated.

6. That tyranny is the worst of every species of dominion, as it is the very opposite of a regal government, and puts in requisition every bad quality of the soul, since a tyrant is guided neither by intelligence nor law, but mainly by caprice. He concludes, on the whole, that although monarchy be the best of all known or practised governments, still it falls far short of a seventh species, which is as much distinguished from a regal government as to excellence, as God is from the human race, and that this ad-

mirable form admits of no divisions. This ideal polity he gives no account of in 'Politicus,' but reserves the consideration of it for his celebrated work entitled 'The Republic,' which we shall now proceed briefly to examine.

The treatise 'De Republicâ' is, as has been intimated, a kind of political romance, in which Plato makes Socrates recite certain dialogues supposed to have occurred between that great philosopher and five others, in the house of Cephalus, at the Piræum. The object of these dialogues is to present an imaginary government which shall combine every excellence, and avoid every imperfection; one which is based on all the virtues of our species, and so constituted as to shun every practical evil which might result from the vices of man. Plato considers that all other governments are so many deviating forms, or deflexions from that perfect model which is given in the 'Republic.' In the ninth dialogue of this work, he states, in substance, that no such perfect government hath ever been practised; that it is a mere *ens rationis*, but still that its excellences may, and ought to be imitated by all governments, as far as the vices of man do not raise a perpetual barrier. Those, consequently, who have censured Plato for making a mere *beau ideal*, a fiction of the brain only, the foundation of a political system, appear not to have duly appreciated his motive. The state of nature, for example, though it may never have existed, may still be used by the philosopher as a means of conveying much useful instruction, and be made the foundation of as legitimate and salutary inferences as if the state had actually existed, and men had departed from it by primary associations, and, in time, by the formation of civil societies. So, again, the moralist may delineate a perfect man, and hold him up as a model for imitation, and yet there is not the least danger of confounding the real, with this imaginary character of man. The objection, then, to which we allude, appears to be wholly

groundless. Plato never offered this system to the world as a practical scheme of polity, but merely intended it as a lesson to those in power, and an exemplar for feeble imitation. In that beautiful little Italian work by Count Verri, in the dialogue which occurs between the ghosts of Cato the Censor and of Cicero, on the question 'whether learning corrupts manners,' it was objected to Cicero that his favourite Plato had banished the divine Homer from his imaginary republic. Cicero is made to reply, that 'Plato himself would not have been willing to live in it; for if Plato had not drunk at the pure fountain of the majestic eloquence of Homer, he would never have possessed that magnificence of style, that dignified simplicity, and that abundance of charms, by which his occasional inextricable opinions captivate the mind with flattering illusion. Plato thought fit to contrive the plan of a perfect government, since the world afforded no example of such a one for imitation; and it is fortunate that no nation has attempted to reduce this refined theory to practice, since it would have exposed the reputation of that illustrious philosopher to the cavils of the ignorant.'*

This imaginary system, which Plato calls, *per excellentiam*, the 'right government,' is one of five forms set forth by him in these dialogues. The classification in the Republic is considered as exclusively Plato's; whereas that which is given in 'Politicus' is supposed to be, in substance, the same with that taught by his great master Socrates.

The five forms enumerated and described in the treatise under consideration, are Timarchy, Oligarchy, Democracy, Tyranny, and the Right Government, that is, his own ideal system, which it is the main object of the treatise 'De Republicâ' to set forth.

The entire classification of governments described in this work, rests on a fanciful and ingenious comparison, which

* Vide Roman Nights, 255.

is preserved throughout, between the four first mentioned governments, and as many imaginary individual characters. He contends that these governments, which are departures from his own perfect form, take their rise from four several evil dispositions of the human soul, viz. Ambition, Avarice, Impatience of Restraint, and Prodigality without Virtue. Hence these four governments are characterized each by its particular vice, which in time produces its certain dissolution. Plato first describes the ideal perfect man, whom he endues with a full measure of the cardinal virtues, justice, temperance, prudence and fortitude, and holds that his right government must entirely correspond with this imaginary individual. The other forms, he says, are more or less corruptions of the perfect one, as they disregard the practice of the cardinal virtues; and that what is just and prudent and temperate and courageous in the soul of a perfect man, will be the rule of action in the right government. He considers that a soul may be actuated mainly by three principles, viz. Reason, by which it consults on the means of self-preservation; Anger, by which it avenges wrongs; and Prudence, by which it is led to supply the demands of our nature. So a well regulated polity will have three great objects in view, viz. to reason, to war, and to provide. Hence, says he, the three essential spirits, the Guardian, the Auxiliary, and the Mercenary. There being as many kinds of republics as there are souls, these giving rise by their prevailing temper to their respective forms of government, there will be an Ambitious Republic, an Avaricious Republic, a Licentious Republic, and a Prodigal or vicious Republic. Plato then proceeds to describe in order, how these four governments are generated, the characteristics of each, and the man or individual who corresponds to the temper of the particular government. After these four comparatively corrupt go-

vernments are thus delineated, he proceeds, in the last place, to describe the Perfect Form.

We shall now make a brief examination of Plato's views of the four imperfect governments, and

1. OF TIMARCHY. To this government our philosopher has given several other names, as the Cretan and Spartan, because he regards the constitutions of Crete and of Lacedæmon as very similar to this: He likewise calls it an ambitious republick, or timocracy, because in such a government the rule is in the hands of the wealthy and ambitious. Their rulers, he says, will be honoured; the military will be a distinct body, engaged only in martial and gymnastic exercises, having nothing to do with agriculture and the arts. In such a government wisdom and knowledge are but little respected, when compared with strength, and an acquaintance with the manœuvres and stratagems of war. The military become fond of wealth, and ambitious spirits rise into influence. This species of government may be compared, he thinks, to an ambitious man; one arrogant and rough to his inferiors, mild to his equals, and even submissive to those above him.

2. OF OLIGARCHY. In this government the ruling principle, according to Plato, is avarice, or the acquisition of wealth, as ambition is the soul of timarchy. The poor have no share in the government. Power is monopolized by the few who are rich, and these are ever active to keep themselves in power, as the only means of preserving their wealth. Hence two factions arise, viz. the rich and the poor, the latter of whom are by far the most numerous. Wars do not often occur, because those in power are afraid to trust arms with the multitude; and they are also too parsimonious to advance the means which are requisite to sustain wars. The people are kept in strict subjection, not only by force, but by various contrivances. Under

such a government the same individual often follows the profession of agriculture, of the arts, and of war.

The man who corresponds to the spirit of this government, is then described, and he is said to be generally one who has been ambitious, and is now mainly avaricious. The change from a timocratical to an oligarchical man is next described; and lastly, the mode in which an ambitious republic is apt to become an oligarchy.

The student will here perceive that oligarchy has a signification given it somewhat different from what is usual, as it is generally contrasted with aristocracy. A government by a few according to laws, which is an aristocracy, is usually opposed to a government by a like few, but administered corruptly, and without laws. Plato, however, does not mention aristocracy in the 'Republic,' nor does he consider oligarchy in any other light than as a government chiefly actuated by the principle of conferring power on the wealthy alone.

3. OF DEMOCRACY. This form is where the multitude govern; and the spirit which actuates it is said to be a restlessness under restraint. Plato regards it as decidedly more corrupt in its nature or tendencies than the other two. In a democracy, which is the reverse of an oligarchy, the poor prevail over the rich. Education is but little regarded. The rich are envied or despised. Two violent factions arise, viz. the oligarchic and the democratic. Actions and speech are but little restrained. Offices are open to all without any qualification, and are given to those who can intrigue the best. Talents and genius of every description present themselves. Wisdom and virtue are not unfrequent; but there is no fixed character; no established rule of conduct, fickleness being a striking characteristic. He then proceeds to describe the democratic man, and how democracy is apt to arise from the corruption of an oligarchy.

4. OF TYRANNY. The last of the four imperfect forms of government described in the 'Republic,' is Tyranny, which he says is apt to be produced by the corruption of a democracy. He thinks the people, who are always violent in their prejudices, will exalt some favourite, who ungratefully betrays them, and becomes a tyrant. Under this government laws are not regarded. Caprice, and the will of the tyrant, alone govern. Wars are frequent, seditions occur often, the spirited and free are silenced by bribery or death. The tyrant commences his reign with affable and courteous manners, and with modestly declining the title of monarch; lavishes presents on many who can serve him, appears the friend of the poor, but, when fully established, extorts money by every species of device. Wisdom, learning and virtue are discouraged. He makes the slaves free, and constitutes them his body-guard. The wealth dedicated to sacred purposes, is gradually brought into his treasury. Rich and ambitious men are considered enemies to the state, and are often sacrificed in order to get rid of opposition, and sometimes to become possessed of their wealth. Plato then describes the tyrannical man, that is, such a disposition as is peculiarly suited to turn traitor to the people, when their affections have indiscreetly elevated him to supreme power. Such a man, he thinks, will be faithless, unjust, a coward, envious, cruel, and a promoter of all vice; and according to his doctrine of numbers, is 729 removes distant from a king, the tyrant being represented by the multiple of 1. 3. 9. 27. 729, the first of which denotes the unity and perfection of the royal character, as the fifth does its last faint image, the tyrannic character.

5. OF THE RIGHT GOVERNMENT. Aristotle, in the commencement of his second book of politics, enters into a brief examination of his illustrious master's opinions concerning the imaginary best form of government; and

with that respect for truth which so strongly marked his life, he does not hesitate to speak with all plainness his objections to the fanciful notions of government set forth by Plato in the work 'De Republicâ.' But though Aristotle declines to adopt the ideas of Plato in regard to the 'right government,' he thinks that this, in common with other ideal forms, is worthy the attention of the political philosopher. 'In order,' says Aristotle, 'to discover and ascertain that form of society under which those would prefer to live who were at liberty to choose a mode of civil existence completely agreeable to their wish, we must not only consider the most admired political institutions that have actually prevailed in the world, but likewise examine those imaginary plans of perfect government which fancy has devised, and which philosophy has highly approved. Such an examination will enable us to determine the hitherto undefined limits of justice and utility, in matters of society and government, and will thus rescue the present work from the reproach of being undertaken for the unworthy purposes of ostentation or censure.'*

It is not my intention to collect from the elaborate pages of the treatise 'De Republicâ' the ideas of Plato as to this imaginary or perfect republic. It would be rather curious than useful. It is sufficient, in addition to what we have already incidentally stated concerning it, to remark that it is a species of simple aristocracy, so constituted, as Plato supposes, as forever to banish vice from its dominions, and produce a state of unalloyed human happiness. In this republic the idea that a commonwealth is a partnership, is carried to the greatest possible length, as it demands a community, not only of all possessions, but even of wives and children. There are many notions of an equally impracticable nature, which justify the sound-

* Gill. Aris. Poli. Lib. 2, p. 73.

ness of his own criticism, when he states, at the end of his ninth book, that 'the city we have now established exists only in our reasoning, since it is no where on earth, as I imagine. But in heaven there is probably a model of it for any one inclining to contemplate it, and, on contemplating it, to regulate himself accordingly. And it is of no consequence to him whether it does actually exist any where, or shall ever exist here.'

The preceding account of Plato's philosophical opinions on government, which we have collected from his works with some pains, contains much of the substantial part of the treatises entitled 'Politicus' and the 'Republic.' It has been an ancient fashion to extol this philosopher as the Divine Plato; and his ideal republic, in common with his other works, has been lauded in nearly all ages in a strain of more than ordinary eulogium. Of its eloquence, which Cicero so much praises, as being that of Jupiter himself, no one, we presume, can speak but in terms of admiration; but as a work of utility, sound sense, and real knowledge, it appears to us to fall far short of the 'Politics' of his distinguished pupil Aristotle, which has been read and studied with delight and great advantage at all times, and probably laid the foundation of Montesquieu's immortal work. The treatise *De Republicâ* has been studied, we apprehend, but by a few, though it may be entitled to the incidental merit of having originated the *Oceana* of Harrington, the *Utopia* of Sir Thomas More, and various other like works. We shall now proceed to the consideration

OF SOCRATES' VIEWS OF GOVERNMENT. We have already stated that Plato makes Socrates relate the whole of the ten dialogues of the Republic, and we find him the chief interlocutor in most of the other works of his eminent pupil. Hence it has been supposed that Plato has but echoed the opinions of his master, or that it is at least uncertain whether it be Plato or Socrates who speaks.

There are no works of Socrates extant; but on the subject of government, Xenophon, in his *Memorabilia* of Socrates, has given us many of the ascertained opinions of that great philosopher. His classification of governments, as given by Xenophon, is briefly and in substance as follows. He enumerates five species of polity, viz.

1. REGAL GOVERNMENT.

2. TYRANNY.

3. ARISTOCRACY.

4. PLUTOCRACY.

5. DEMOCRACY.

An individual who governs according to laws, and with the consent of the governed, is a King.

He who governs without fixed laws, against consent, and according to his own pleasure, is a Tyrant.

A few who govern with consent, justly, and according to laws, constitute an Aristocracy.

A few who have power because of their wealth, establish a Plutocracy. And when people of all classes govern, though justly, and according to laws, the government is a Democracy.*

OF ARISTOTLE'S VIEWS OF GOVERNMENT. Among all ancient philosophers who have transmitted us their views of political science, none appears to us so comprehensible, methodical and satisfactory as Aristotle. His work entitled '*Politics*,' merits the high encomium of Dr Taylor, who pronounces it 'one of the most sterling among the works of antiquity, and an inexhaustible treasure to the statesman, the lawyer, and the philosopher.'† His classification of the forms of government differs but little from those of his illustrious predecessors.

When the publick good is the object of one man in authority, Aristotle calls this a Regal Government: When

* Xen. Mem. Soc. Book 4.

† Taylor's Civil Law, 342.

the same power is in the hands of a few, an Aristocracy: And when in the hands of a multitude, a Commonwealth, Polity or Republic.

But if the object of the single ruler be only his own advantage, it is then a Tyranny; and the same feature turns an Aristocracy into an Oligarchy, or a Republic into a Democracy. Thus, a Regal Government, an Aristocracy and a Republic are called by Aristotle pure governments; and to the three impure governments he applies the names of Tyranny, Oligarchy and Democracy. By Monarchy he means simply the government of one person, which, as in Plato's Epistle to Dionysius, may embrace the government of a tyrant no less than that of a king. The Regal Government, he says, is of five kinds, viz.

1. THE HEROIC GOVERNMENT. This is the rule of a king, where the subjects have voluntarily submitted to him civil, military and religious powers; but still so limited as not to clothe him with the power of life and death, nor any other authority which would be apt to be tyrannically abused. This he supposes was the power possessed by kings in the heroic ages, when heroes and demigods are believed to have governed men with the strictest regard to justice. This government, he says, may be either hereditary or elective.

2. THE BARBARIC GOVERNMENT. This, he states, prevailed among the Asiatic barbarians. The king is absolute, but yet governs according to laws. The power is hereditary only.

3. ÆSYMETIC GOVERNMENT. It is so called from the Æsymetes of ancient Greece, who were elective tyrants, chosen for life, or for a limited term, or for some special purpose, but with powers limited whilst they endured. This government is a mixture of royalty and tyranny. He exemplifies it by Pittacus, who was chosen by the people of Mitylene to conduct the war against the exiles, but

who cruelly tyrannized over an ill-fated country. This government, you perceive, may also be illustrated by the power conferred on the Roman Dictator.

4. THE SPARTAN GOVERNMENT. This he represents as a limited royalty, hereditary, but conducted with justice, and according to laws. In such a government the king is a general in war, a judge in peace, and the chief in all matters of religion not specially appropriated to the priesthood. He exemplifies this form by the government of Sparta.

5. THE REGAL GOVERNMENT, properly, and by way of distinction, so called. This he conceives to be the most absolute of all, because the king is the most eminently qualified. Such a ruler bears to the state the same relation as a good master to his family, the whole sovereign authority being concentrated in him. This power, he says, is derived to him from the superior excellence of his character, the preeminence of his virtues. This doctrine Aristotle himself appears to advance with some caution; but being desirous perhaps to compliment his illustrious patron, and his distinguished pupil, he unfolds his doctrine on this subject gradually, as if the native honesty of his soul had some conflict with his desire to flatter the father and the son; on whom his fortunes somewhat depended. In the eighth chapter of his third book, he seems to argue and to qualify the doctrine; in the ninth it appears more broadly; and in the conclusion of the tenth book, it is displayed in all its nakedness and folly. In a preceding lecture we stated fully our views of this subject. The people would, no doubt, act wisely were they always to select the most virtuous and best qualified to govern them. But we cannot admit with Aristotle, that knowledge and virtue confer *per se* a positive right to governmental power, or that such persons ought to be exempt from all government, and be a law unto themselves! Laws, says he,

should only be among equals in kind, and it would be as absurd to subject the preeminently virtuous and wise to laws, as it was in the fable of Antisthenes, where the hare claimed an equality of power and rights with the lion, that king of the forests. And after exemplifying his doctrine still further, he concludes that 'all men should cheerfully and uniformly obey all such rulers, and acknowledge the natural and perpetual sovereignty of their virtues.'*

OF POLYBIUS' VIEWS OF GOVERNMENT. Not a great deal is known of the opinions of Polybius on the subject of government. In a fragment of the sixth book of his Roman History, which is appended by Spelman to his translation of the 'Roman Antiquities' of Dionysius of Halicarnassus, Polybius remarks that 'it is customary to establish three sorts of government, viz. 'Kingly Government, Aristocracy and Democracy; upon which one may ask them, whether they lay these down as the only forms of polity, or as the best; for in both cases they seem to be in an error, since it is manifest that the best form of government is that which is compounded of all three.'* Polybius then proceeds to give, somewhat at length, his views of the simple governments, and of their natural tendency to degenerate. He applies his observations to the Roman commonwealth at the commencement of the seventh century A. U. C., at that period in a most flourishing condition; and though he considers the mixed constitution of Rome as at that time the most perfect model of government known to the world, yet he predicts its downfall from defined causes, and with a degree of confidence almost amounting to prophecy. These are his general views. We shall now inquire more particularly into his opinions.

Polybius considers monarchy as the first form of government known to man, and the work of nature herself;

* Spel. Rom. Antiq. 391.

but denies that any has ever been established which did not contain within itself the seeds of its own degeneracy and ultimate dissolution. These inherent infirmities or vices inevitably, in time, convert it into a tyranny, or at least into an aristocracy. He explains the reasons why it is not in the nature of monarchy to continue pure, and says that when aristocracy is raised on its ruins, the laws and the rights of the governed will be respected for a time, that is, until the similar inherent seeds of corruption in this form also, will occasion it to degenerate into an oligarchy: That ambition, avarice, and other odious passions will display themselves, and that if the same aristocratic rulers do not fall victims to the disease, their descendants most probably will. He further states that the oligarchy thus generated, will in turn yield to a democracy. The people will become disgusted with the vices of their rulers, a leader will place himself at the head of the multitude, and those in power will be at once displaced. The people may, for a time, be happy in the enjoyment of their liberties, but, after a while, ambitious and intriguing spirits will appear, and a monarchy or tyranny will be re-established. This is the eternal round of revolutions to which, in the opinion of Polybius, the simple forms of government are subjected by a law of their very nature. He therefore repudiates the whole of the simple forms, as essentially unstable, but admits that each possesses its peculiar virtues. Polybius then proceeds to comment on the mixed governments. He discourses somewhat largely on the then existing Roman polity, points out the theory of its checks and balances, and admits that the three elementary forms are so admirably united in it, as to render it difficult for any one to pronounce which of them preponderates. This equilibrium is declared by Aristotle to be one of the surest tests of a good and durable government, and notwithstanding this eulogium by Polybius on the constitution of

his country, looking into the vista of futurity, he plainly unfolds the causes of Roman degeneracy, and of Roman subjection. This anticipation of the future destinies of his country began to be verified as early as the seditions of the Gracchi, and was completed in the subsequent overthrow and ruin of the commonwealth.

There can be no doubt of the general philosophical correctness of this theory of political mutations; and Polybius has shown himself to be a sagacious politician, and one of candour and decision, in thus boldly stating a doctrine which to a Roman must have been extremely unpalatable. The student will here observe that Polybius was the first to distinguish democracy into pure and corrupt, by distinct names: for the former he retains the name of democracy, whilst to the latter he gives the name of ochlocracy. We may remember that Plato, in 'Pacificus,' assigns no special name to a corrupt democracy; and that Aristotle always uses the word democracy to signify a corrupt government by the people, and that it arises from vitiating a republic or commonwealth.

We have now finished our brief and desultory remarks on Polybius; but, in connexion with his ideas on the subject of mixed government, we shall advert to an observation of Blackstone, who appears not very correctly to have apprehended the theoretical, or even practical doctrines of the ancients, on this point of blending the principles of the three elementary forms of government. The enlightened Commentator on English Law, without bringing to his view the Lacedæmonian Commonwealth, or the mixed constitution of Rome, of Carthage, or of Crete, and not adverting to the profound views of Polybius, seems to suppose that the ancients had in general no idea of any other permanent form of government than those of monarchy, aristocracy and democracy. And to justify his opinion, he cites a passage from Cicero's Fragment 'De

Republicâ,' lib. 2, and one from the Annals of Tacitus, lib. 4, in which Cicero is merely *of opinion* that a government constituted of the three simple forms would be the best, and Tacitus rejects the doctrine as visionary and impracticable.* It cannot, however, have been the opinion of this able lawyer and polite scholar, that mixed forms of government were unknown to the practice or to the political philosophy of ancient nations. Nor could he have supposed that Cicero designed to advance a novel or untried opinion; or, indeed, that he and Tacitus did not know the precise character of the Roman government, in every stage of its history. His silence on the doctrines of Polybius is, however, a little remarkable, since there can be no mistake in regard to the clear views which were entertained on the subject by that sensible historian. The commentator, perhaps, was so strongly impressed with the passing excellence of the well contrived mixed system of his own government, as to hold in no account the more rude, but still praiseworthy approaches of the ancients towards the now well known theory of governmental checks and balances. Polybius, indeed, has indiscreetly said that 'it is impossible to invent a more perfect system of government,' alluding to the existing government of his country. Modern days have proved him mistaken; but it should be borne in mind that we, also, shall have a posterity, whose improvements in the art and philosophy of government may so greatly excel any of our present conceptions, that they may with justice less respect the great system of English constitutional law, than did the distinguished commentator the various systems known or practised by the ancients.

Let us now pass on to the opinions of some others among the ancients.

* 1 Black. Com. 49.

OF CHARONDAS AND ZALEUCUS. The laws and institutions established by these two early legislators, have gained them much celebrity. Very little, however, is known of either of them. The account we have of Charondas is chiefly from a brief notice of him by Diodorus Siculus, which, in substance, is this. The ancient Sybaris, a Grecian city and colony in Italy, was an aristocratic republic. Before the time of Charondas, it underwent four remarkable revolutions. The first occurred under its governor or chief, Telys, who courted the people, and excited a revolution against the aristocracy of the city. The fortunes of the wealthy were confiscated, and they were banished from the colony. These outcasts having been kindly received by the city of Crotona, of which Pythagoras was a distinguished citizen, Telys demanded their surrender. This being refused, he declared war against Crotona, but was totally defeated by Milo, who gave Sybaris up to pillage, and left it in ruins. Half a century after this, Sybaris was rebuilt, but was again destroyed by the Crotonians. Callimachus, Archon of Athens, again revived it, under the name, however, of Thurium. It then became populous, wealthy and powerful. No less than twenty-five cities, and a splendid capital, were added. Luxury and effeminacy increased to such a degree as to render their name proverbial. An aristocracy was formed, chiefly by the former inhabitants of Sybaris. They seized on all the valuable lands in the vicinity of the city, and left the residue to the new comers. All offices of trust and profit were monopolized by them, and many invidious distinctions maintained between them and the foreign citizens; whilst the poor were either disregarded or oppressed. Force and courage were, however, on the side of the people, and a civil war ensued. The nobility were sacrificed, and the people proceeded without delay to the establishment of a new government. They entered into an alliance

with Crotona, and received into their community emigrants from all parts of Greece. They divided all the inhabitants into ten tribes, chose Charondas for their legislator, and established a democratic government. Charondas, it is supposed, suggested many wise laws, and excellent institutions. Aristotle says that his laws surpass in elegance and accuracy the judicial and legislative compositions even of his own time.*

The fragments of his laws preserved by Diodorus Siculus, relate rather to the civil, than the political state, little being known as to the fundamental laws, or the organization of his government. Scanty as they are, they appear to have excited the respect of those who perhaps knew as little of his laws and institutions generally as we do. They are, in substance, as follows: .

1. Masters, supported at the publick expense, shall be established, and every male child shall be taught to read and to write.

2. No one shall be a member of the publick councils, who, having children, shall marry a second time.

3. Any one convicted of slander, shall be conducted through the streets, crowned with tamarisk.†

* Aris. Pol. Lib. 2, ch. 10.

† Craving indulgence for a momentary digression into the region of flowers, I would remark that this shrub, botanically called *Tamarix*, has in many ancient nations enjoyed a like reputation of exerting some moral or other influence over the human heart and character. It is supposed to be derived from the Hebrew word *tamaris*, to cleanse; and hence appropriately worn by the slanderer, whose foul heart is supposed to need purification. It is frequently alluded to by Virgil in his Eclogues, under the name of *Myrica*, and is called by Pliny *Bria Sylvestris*. Parkinson, in his Herbal, page 1479, has described this shrub, which is indigenous in England, and indeed in most of the temperate countries of the old world, though entirely unknown, I believe, to the botany of this continent, at least of the United States. Phillips in his splendid and fanciful work, entitled 'Floral Emblems,' places the *Tamarix* under the head of 'Crime.' He says that it was a custom with the Romans to put wreaths of this flexible

4. No one shall associate with people of vicious character.

5. Laws shall be changed only when the citizen who proposes the alteration or repeal, appears in the publick assembly with a halter round his neck, by which he shall be hung if the proposed change be not adopted by the people.

6. The guardianship of the estate of orphans shall be entrusted to relatives on the side of the father, and the persons and education of orphans shall be entrusted to relatives on the part of the mother.

7. Those who refuse to fight for their country, shall not be put to death, as formerly, but shall be exposed in the publick square, in woman's apparel, during three days.

8. No one shall appear armed in the publick square.

However wise the political laws may have been, all agree that the government was too democratic, and that it was not sufficiently balanced. In regard to the last law we have mentioned, it is related of Charondas that, on being informed, on a certain occasion, that great commotions had taken place, he hastened, with his sword on, into the publick assembly, in order to suppress the disorder. Being reproached with violating one of his own laws, (though it was merely accidental that he then appeared with his sword,) he hastily replied, 'I shall vindicate the law,' and immediately plunged the sword into his own heart. Thus terminated the government and career of this patriot and legislator.*

ZALEUCUS has also great traditionary fame, as a wise legislator; but his laws and institutions have almost wholly

plant on the heads of criminals; that it is from this circumstance called the accursed or unhappy tamarisk.

It belongs to the *Pentandria Triginia*, artificial class and order of Linnæus, and to his natural order, *Succulentæ*.

* Diod. Sic. Lib. 12, page 486. Bentley's Dissertation upon Phalaris, 368.

perished. It is a little singular that several of the laws &c. of Charondas have been ascribed to Zaleucus, and some which are with confidence attributed to Zaleucus, are placed by others to the account of Charondas. Thus, for example, the law relative to the repeal or modification of laws, is ascribed by Demosthenes and Stobæus to Zaleucus. So, also, the celebrated preamble to the code of Zaleucus, which is still extant, has been with equal confidence given to Charondas. A few of the laws of Zaleucus are to be found in Plutarch's lives.

Both Zaleucus and Charondas are said to have been disciples of Pythagoras. The government of the former was more aristocratic than that of the latter, and was also much more lasting. The respect of Zaleucus for religion is strongly manifested in his preamble; and the other two springs of his government are said to have been a high sense of honour, and a strict sense of obligation.

We shall conclude our examination of the views of ancient legislators and philosophers on the subject of the forms of government, and of political science, with adverting to Cicero, intelligent, pleasing and eloquent always, *quem appellâsse, laudâsse est*. The opinions of this polite, and no less sound philosopher, on the topics of our inquiry, are to be found in his treatise 'De Legibus,' and in the fragments which have been preserved of his treatise 'De Republicâ.'

The fate of the treatise *De Republicâ*, also known under the name of 'The Dialogues,' is familiar to every scholar. 'Political students,' says Mr Macaulay, 'have reason deeply to regret the loss of Cicero's Treatise. Among many interesting discussions, it doubtless contained a classification of forms of government; and it is probable that Cicero followed the old division of Socrates, more than that which is peculiar to Plato. But whatever system he adopted, he

no doubt varied it so as to accommodate it to the preference which he was ever zealous to attribute to the Roman constitution.*

The knowledge possessed in modern times of this favourite work of the philosopher of Tusculum, was derived, until very recently, wholly from a few scattered fragments preserved by various writers in the form of quotations; principally by Lactantius, Aulus Gellius, St. Augustine, Macrobius, Priscillian, Seneca, and by Cicero himself. The whole of these however, if collected, would not amount to more than one-twelfth of the treatise when entire. During many centuries, the learned world deplored the loss of a treatise so much praised, not only by the friends and cotemporaries of its illustrious author, but by the philosophers of all times, since the disappearance of the work. No satisfactory evidence is said to exist of their being a single copy of this production extant, since the tenth century, till, singular and interesting to relate, the work was discovered, and partly brought to light, by Sig. Mai, the present librarian of the Vatican.

It appears that St. Augustine, who so frequently alludes to this work in his treatise '*De Civitate Dei*,' obliterated from the parchment which contained it, this relic of Cicero's latter and more mature genius, and supplied its place with his own commentaries on the Psalms of David.

The practice of effacing former inscriptions for the sake of the parchment, then so valuable, had been long known, and led to the librarian's interesting discovery. By the application of chemical agents, the commentary of St. Augustine was in turn effaced, and Cicero's treatise made in part to stand forth, in nearly all its original accuracy. Still, however, these discovered portions amount only to about one-fourth of the entire work. They, together with the

former fragments, have recently been published by Sig. Mai, with explanatory notes, and an interesting narrative of the discovery. This librarian's work has not yet reached the American public, and I have no further knowledge of it than what has been derived from the English and American literary journals, by which it has been considerably praised. From the specimens, however, which are given it appears to me that the treatise *De Republicâ*, even in its present form, is to be valued more for its euphonic and glowing eloquence, than for solid or valuable information in regard to the views of Cicero or the ancients on the subject of political science, and the forms of government. Cicero may have aimed at the production of a work, not only similar in title to that of his favourite Plato, but resembling it in that which we think mainly distinguishes the work of the Greek philosopher, its style, which, as Cicero himself asserts, the gods would not fail to adopt, were they called to use the language of men. If this were the desire of the Roman orator, his style would be highly polished, to the prejudice, perhaps, of substance, and that deep and elaborate knowledge which it would be so desirable at this day to find in it.

From the information we have of the work thus brought from its concealment, we find that Cicero, in his first book, speaks of the origin of society and government, and of the advantages and disadvantages of the simple forms of government; the whole of which is considered by him in a manner very similar to that of Socrates, of Aristotle, and of Plato in 'The Pacificus,' verifying the supposition of Mr Macaulay to which we have already alluded, that in the last treatise he did not doubt that Cicero had treated the subject of government, and its various forms, in the manner rather of Socrates, than of Plato in the Republic; and further, that he presumed the government to which Cicero would manifest a decided preference, would

be of the mixed form, similar to that of Rome. Although the anticipations of this writer have been realized to this extent, yet his expectation in regard to the value and excellence of the lost opinions of Cicero, does not seem to be justified by what has been redeemed from darkness, by Sig. Mai's discovery. In the second book of this treatise, Cicero speaks of the Roman government, which, as he thinks, combines the characteristic excellencies of the three elementary forms. He then points out the liability of these simple forms to degenerate into tyranny, oligarchy or anarchy; which is a view very similar to that which we have stated from Polybius. The fragments of the third book are taken up chiefly in the discussion of the benefits which flow from the virtuous administration of a government; and the remains of the fourth and fifth books are extremely meagre, very little being known even of their general contents.

To the sixth book it is said that Sig. Mai's discovery has added nothing. It is known, however, to have contained (as Plato's Republic does) a description of an imaginary perfect man, or rather citizen. From the whole then, as far as we have been able to ascertain the extent and value of the fragments lately brought to light, we cannot perceive that much has been added to our stock of knowledge in regard to the opinions of the ancients generally, or of Cicero in particular, as to the theory of government, especially of the mixed kind, in which alone are the modern nations much interested, the doctrine of checks and balances in political rule being at this day a topic of the greatest interest to the statesman and philosopher. We admit that our means of judging of Sig. Mai's new edition of the treatise *De Republicâ*, are very limited. Every polite scholar, we are sure, will heartily welcome every new period from the honeyed pen of Cicero. But those who are in search of sound opinions on the true theory of

government, will find perhaps in these new fragments more fascination than knowledge.*

Having completed the examination, as far as we designed, of the opinions of ancient legislators and philosophers, we shall now proceed to a similar inquiry into the doctrines of some of the more distinguished among the moderns; after which we shall take up the remaining topics, as designated in our syllabus.

Among the moderns, those best known to the English and American jurisperit, as having contributed largely to the improvement of the science of political and constitutional legislation, are Machiavel, Harrington, Sidney, Montesquieu, Milton, Locke, Bolingbroke, Hume, Frederick II., Napoleon, Bentham, and the Authors of the *Federalist*. Each has great merit, and all have, in various degrees, and in different ways indeed, considerably enlarged the boundaries of this science, and supplied materials whereby the civil and political liberties of the subject or citizen have been greatly augmented and secured. We shall present to you a brief notice of the principal works and leading doctrines of these distinguished writers; our chief object being to invite your attention to them, by making you somewhat acquainted with their achievements in the field we are hastily surveying.

1. OF MACHIAVEL. This celebrated political writer was born at Florence, it is supposed in 1469. It has been his fate, while justly eminent for genius, learning, and worth of the first order, to have been regarded by many as given over to vices of the most open and heinous character, as blasphemy and atheism. Before we proceed to our cursory notice of his works, we shall examine a little into the celebrated controversy which exists in relation

* Since the present lecture was delivered, Sig. Mai's work has appeared in this country. We have carefully examined it, but find no occasion to vary the foregoing remarks.

to the character and design of one of them, entitled 'The Prince;' a controversy in the republic of letters, which may be regarded as a phenomenon, and which remains to this day not entirely settled, though more than three centuries have elapsed since the publication of the work. Yet the work itself is perfect, free from mystery, unequivocal in its expressions, full of illustrative examples and, as we think, consistent in its design throughout. Machiavel is the author of several works; but those of most renown, which have been read in all nations, studied by emperors, kings and scholars, and have been equally the favourites of tyrants, and the zealous friends and champions of freedom, are his 'Prince,' the 'Discourses on the First Decade of Livy,' and his 'History of Florence.'

The controversy to which we have alluded, relates chiefly, as we have stated, to his 'Prince.' By one party it is strongly maintained, that he stands a solitary example of a writer who has undisguisedly laboured, in a methodical and learned treatise, to instruct rulers in the odious art of tyranny; to reduce the scheme of absolute government to a science; and, finally, to present to future sovereigns a manual of instruction in the detestable policy which shall mete out to their subjects as little of the goods of life as possible, while it extracts from them whatever may be required for the wealth, the pageantry, the power, and the aggrandizement of the prince. Those who support this opinion, have spoken of Machiavelism and tyranny as strictly synonymous. They regard his policy, not only as a system of oppression, but of the basest intrigue and perfidy.

By another party it is urged with equal confidence, that tyranny never had a greater enemy than in Machiavel; that the whole work is a bitter satire on the actual conduct of tyrannical princes; that under pretence of instructing sovereigns, he has given the most important les-

sons to the people; and that the arts of government, as they are often practised, are exposed, not for imitation, but for abhorrence. There is a third, and, indeed, a fourth opinion in regard to this celebrated work, viz. that Machiavel had no very definite or fixed design; that 'The Prince' was intended neither as a manual for tyrants, nor a guide for republicans, but was written more through spleen, or a desire to evince his sagacity and great versatility of genius, than for any other cause. On which side of this old controversy the truth lies, is perhaps not extremely material, as it is very evident that, be the author's design what it may, lessons useful both to the arbitrary views of monarchs, and the liberal schemes of a people, may be extracted from it; though, on the whole, we regard the works of Machiavel, and this among the number, as having a tendency decidedly more favourable to liberty than to tyranny. We shall pursue the subject, and place before the student our reasons for believing that Machiavel has been greatly traduced. It will be important to recollect that Machiavel has been accused, not only of being the friend of arbitrary rule, and of teaching despots how to tyrannize, but also of the opposite offence of so greatly favouring a democratic form of government, as to have been induced to teach the principles of insubordination, and to excite the people to rebellion. Charges so different in their nature cannot be easily credited, and, of themselves, seem to raise a presumption of innocence of both. In such a controversy, we think Machiavel is entitled to be heard, and to testify in his own cause. He has had many friends, indeed, who have declared their belief in the purity of his intentions; but we shall first refer to his own vindication, in his letter addressed to his friend Zenobio.* In that letter he vindicates himself, first, against the charge of such affect-

* Vide Harl. Misc. vol. 1, 75.

tion for democracy as indicates a rebellious spirit; secondly, against the offence of impiety, and of vilifying the church; and lastly, against the accusation of teaching monarchs, in his book of 'The Prince,' all the execrable villanies that can be invented, and instructing them how to break faith, and so to oppress and enslave their subjects. In regard to this charge, he concludes his letter thus: 'I come now to the last, which is that I teach princes villany, and how to enslave and oppress their subjects. If any man will read over my book of 'The Prince' with impartiality and ordinary charity, he will easily perceive that it is not my intention therein to recommend that government, or those men, there described to the world; much less to teach men to trample upon good men, and all that is sacred and venerable upon earth, laws, religion, honesty, and what not. If I have been a little too punctual in describing these monsters, and drawn them to the life, in all their lineaments and colours, I hope mankind will know them the better, and avoid them; my treatise being both a satire against them, and a true character of them.' This letter bears date April 1, 1537.*

That this is the true light in which this work ought to be regarded, also appears manifest when we see who have been generally the advocates of the opposite opinion. His vehement censure of the abuses of the court of Rome brought upon his name and writings the thunders of the Papal See, which were issued against him many years after his death. During his life, Machiavel was found but little fault with by the church. But more than half a century after, we find that by a bull of Clement VIII. 'The Prince' was condemned, and every one held liable to ex-

* I find, by a letter of the Bishop of Gloucester, dated May, 1760, there is reason to doubt the genuineness of this vindication, and that it is the production either of Mr Nevil, the author of *Plato Redivivus*, or of the Marquis of Wharton.

communication who should read it. Another class of enemies to the fame of this great genius consists of the friends of absolute monarchy; for on the reestablishment of despotism in Florence, Machiavel was deprived of all office, imprisoned, and even tortured; a strong proof of the general tendency of his writings, and the true acceptance in which they were held by the advocates of unlimited rule; and that the idea of his deliberately teaching the art of tyranny, is without the least foundation. His enemies, however, have inferred that 'The Prince' was seriously intended thus to instruct monarchs, from the apparent absence of irony, from its didactic character, and from there being, as is said, similar doctrines in the Discourses on Livy. Of this opinion are many persons of learning and discrimination, as Moreri, Cardinal Pole, Rupert, Tenhove, Lucchesini, Jovius, Frederick of Prussia, Voltaire, Tiraboschi, Ambrose Catharinus, Mr Roscoe, and Lord Lyttleton, the last of whom, though he admires the 'Discourses,' regards 'The Prince' as an infamous production, though written, as he seems to think, not so much from an utter recklessness of principle, as to display his genius in politics, and gratify the vanity of excelling all others in teaching that art.*

Let us now advert to some of those who have spoken favourably both of the design of the author, and the tendency of the work. It must be conceded that those who lived with, and intimately knew Machiavel, entertained no doubt as to his republican opinions, or that his works were designed by him to display, not what a prince ought to do, but what he frequently practises. The celebrated Harrington, that famous advocate of liberty, appears to have cherished no doubt on this subject. When unexpectedly summoned to the Tower on a charge of seditious practices,

* Litt. Dial. of the Dead, dial. xii, page 90.

and of too much freedom in his writings, he justifies himself by the examples of Aristotle, Plato, Livy and Machiavel, all of whom, and especially the last, he regards as friendly to the civil and political liberties of man.* Of the same opinion was Albericus Gentilis, who considered both the design and tendency of the work to be satirical.† And Lord Bacon in his treatise ‘De Augmentis Scientiarum,’ observes that, ‘A serious and prudent description of the crimes and artifices of men is to be considered one of the greatest bulwarks of virtue and probity. We are hence beholden to Machiavel and such writers, who openly and unmaskedly relate what men do in fact, and not what they ought to do.’‡ §

In that learned, witty and able essay of Allen’s, entitled ‘Killing no Murder,’ addressed by him to his Highness Oliver Cromwell, the enlightened author shows, on several occasions, his belief that Machiavel was the friend of the people.¶ The same opinion is entertained by the learned Wicquefort, who, conscious of the prejudice against Machiavel in the minds of some, especially in catholic countries, remarks that ‘people will, perhaps, be scandalized when I say that all the works of Nicholas Machiavel may be of mighty use to the ambassador. I do not pretend to apologize for the Florentine politician, for I must own there are some passages in him that are not very orthodox:

* Harr. works, xxx.

† De Legat. lib. 3, cap. 9; Farne. Mach. vol. 1, 482, 490.

‡ 1 Shaws’ Bacon, 191.

§ ‘Verum tractatio hujus de quo loquimur argumenti, gravis et prudens, atque cum integritate quâdam et sinceritate conjuncta, inter munitissima virtutis ac probitatis propugnacula videtur enumeranda.’

‘Est itaque quod gratias agamus Machiavello et hujusmodi scriptoribus, qui apertè et indissimulanter proferunt quid homines facere soleant, non quod debeant.’—De Aug. Sci. lib. 7, ch. 2. 7 vol. Bac. works, 361.

¶ Harl. Mis. vol. 9, 290 &c.

but then I shall not scruple to maintain that there are some which are capable of a much more favourable explication than what is commonly given them by pedants. We must suppose him, almost every where, to say what princes do, and not what they ought to do; and if he sometimes mingles maxims that seem inconsistent with the rules of the christian religion, it is to show the practice of usurpers and tyrants, and not how lawful princes ought to behave themselves.* In the Harleian Miscellany we also find an essay entitled 'Vindication of that Hero of Political Learning, Nicholas Machiavel.' It is written by one James Boevy, and bears date 1692. The author remarks, among other things, as follows. 'Nicholas Machiavel is cried down a villain, though many think he deserves a better title.'—'One who intends to express a dishonest man, calls him a Machiavelian.'—'If any can pretend a just quarrel with Machiavel, they are kings.'—'If the lives of Lewis XI. or XIV. were examined, it would be found they acted more ill than Machiavel wrote, or, for aught is known, ever thought: yet the first has had wisdom inscribed on his tomb, and the last is cried up for a great statesman.'—'Machiavel having to make a grammar for the understanding of tyrannical government, is not to be blamed for setting down the general rules in it.'—'He was of an honourable family, born at Florence, and the writer hereof being at Florence about the year 1642, made what inquiry he could after his reputation, and found that he left a good name behind him, as a pious, charitable, sincere, good man as any in that city.'† The opinion of Rousseau on this point is entitled to great respect. He remarks that 'Machiavel, under the pretence of instructing sovereigns, gives important lessons to the people. His Prince is the manual of republicans. His connexion with

* Ambassador, book 1, chap. 7, page 53.

† Harl. Miscel. vol. 10, 183.

the house of Medici obliged him, during the oppression of his country, to conceal his love of liberty. The choice of his execrable hero sufficiently evinces his secret design; and the opposition of the maxims in his Discourses on Livy, and in his History of Florence, to those in his Prince, proves that this profound politician has hitherto had only superficial or corrupt readers. The court of Rome has strictly proscribed his works; yes, indeed, because it is described in them too truly.* Boccacini, though a firm catholic, has taken side with the friends of the great Florentine, and boldly says that he has copied his politics from the administration and actual practices of many popes. In vindicating Machiavel, he supposes him before the tribunal of Apollo, and puts into his mouth a speech replete with satirical severity, calling on the tribunal to allow him the privilege of mentioning the names of princes from whose common practice he had but deduced all the maxims and political rules set forth in his work; and pledging himself to a cheerful submission to any punishment, if it should then appear that his condemned precepts are new, and of his own coining. That it is against reason and justice that the inventors of these diabolical practices should be esteemed holy and venerable, when he, who hath merely divulged them, is condemned as infamous. That if the original is sacred, the mere copy cannot be worthy of the flames, and finally, that if he is to be persecuted, then must the reading of all history be forbidden, as that must surely convert readers into so many Machiavels, especially if it be studied by them as politicians.

To the foregoing opinions, of high authority, favourable to the reputation of Machiavel, we shall add that of a very sensible writer of our own country, who thus eloquently

* Rousseau's Social Contract, book 3, chap. 6, page 206, and note.

vindicates the fame of this author, whose writings he is reviewing. 'Is it credible that one who had made it the labour of his life, and no idle life, to support a republic; who had connected with that form of government his fortune and his reputation; who had fallen with it, and had hazarded his life for its reestablishment; should, without any apparent aim of interest or ambition, become the open advocate of tyranny; and that, after this, he should still be courted by the friends of liberty as an associate and a confidant, and still persecuted by its adversaries as an enemy? Is it credible that a man who was forming a complete and elegant representation of the peculiar excellencies of popular government, which he might expect to endure as a lasting memorial of his genius, should at the same time, without a hope or a motive, unravel by night the beautiful tissue that he was weaving by day? Is it credible that one whose talents, and political sagacity, and knowledge of human nature are universally admired, should compose in favour of despotism, a treatise which has in fact been more injurious to it than any other work ever written? Is it credible that the same individual should commit all these absurdities in times of civil discord, and yet not even the watchfulness of party spirit once accuse him of inconsistency? But if we suppose that it was the object of Machiavel to make such a description of tyranny as should excite resistance rather than submission, the riddle of his life is solved; his writings, his conduct, the conduct of his friends, and that of his enemies, are all consistent and intelligible.'*

We doubt not that enough has been said to redeem the fair fame of this eminent political writer. We are entirely satisfied, from a careful examination of his *Prince*, and his *Discourses on Livy*, that they are valuable to all who desire

*North American Review, Sep. 1817, vol. 5, 363.

to become acquainted with the artifices of crafty and wicked politicians, that they may the better guard their liberties against their insidious plans. They are valuable to those who would cherish a lively jealousy of their political rights, and know from history the human heart, when guided by the lust of power, or unrestrained by constitutional barriers. In the works of this master politician they will find that the author, in instructing his New Prince, intends that he shall be guided by maxims the reverse of those which are stated and illustrated; and that he should be warned by the examples given of the disastrous fate which so often attended despots. That this is the designed and actual moral, is clearly apparent from the destiny of his heroes, especially the infamous Cæsar Borgia, whose misfortunes and end were precisely what should always be the fate of those whose lives are marked by oppression, perfidy and crime. This mode of instruction, though novel, is, we think, peculiarly happy. It speaks of the maxims and conduct of despotic princes, points out by precept and example all that is cruel and base in such rulers, and, with the gravity of true irony, recommends what the most wicked of the human race would blush to own as the rule of their conduct. It is quite possible, however, that this work may prove injurious to some minds; and we confess there is much of plain good sense in the reasoning of Frederick, in his *'Examen du Prince,'* and especially in his preface to that work. But we cannot help thinking he has gone a little too far in his augury as to the certainty of its pernicious effects, and can by no means agree with him in his unqualified condemnation of the motives of its author. All, however, must admit that if the Prince be regarded in a serious, and not a satirical light; if it be really what, on its outward face, it appears to be; it is, beyond question, the basest, the most unblushing, and the most diabolical production which ever came

from the pen of man. On the other hand, the work once established as merely satirical, the gravity of the irony can no longer be the source of mistake or mischief, but must heighten the intended effect. We should not have dwelt thus pertinaciously on such a point, had we not felt at heart that the reputation of an author of genius and worth should never be a matter of indifference; that every one has an interest in it, whether he be author, or reader only. And as those are the greatest benefactors or curses to humanity, whose writings, when dictated by genius, shall be found to be guided either by the spirit of good, or by the spirit of evil, it is but common justice, if prejudice or error has sullied the reputation of the former, to remove the blot, though it has subsisted for centuries. The obligation is incalculably heightened, when the writings are those of Machiavel. I need no further apology for having dwelt so long on this topic.

Let us now take a brief notice of his works, and his leading doctrines as to the forms of government, and the political state. His writings are 1. The History of Florence, in eight books. 2. The Prince. 3. The Life of Castruccio Castracani, of Lucca. 4. A Narrative of the methods taken by Cæsar Borgia to despatch Vitellozzo Vitelli, Oliverotto da Fermo, Paolo Ursini, and the Duke of Gravina. 5. A Sketch of the Affairs and Constitution of France. 6. A sketch of the Affairs and Constitution of Germany. 7. Political Discourses upon the first Decade of Livy. 8. The Art of War. 9. A Discourse upon the means of reforming the Government of Florence. 10. Letters on Matters of State. The whole of these have been translated into nearly all the languages of Europe. Farneworth's English translation is in two quarto volumes, and is accompanied by a translation of the King of Prussia's 'Examen du Prince,' together with copious notes, pre-

faces &c. illustrative of all that has been written by Machiavel.

In regard to his division of the forms of government, and his doctrines in political philosophy, we shall be very brief, as they are spread over too extensive a surface to admit of even a concise analysis. His views of government will be found in his two great works, the *Prince*, and the *Discourses on Livy*. In the former he treats of Principalities; in the latter, of Republics; which two forms are the simple and only divisions which he has made. Principalities are treated by him under two cardinal divisions; viz. first, Hereditary in a family which has long possessed them; secondly, Newly Acquired, which may be wholly and absolutely new, or annexed as appendages to the dominions of the prince who acquires them. The object of 'The Prince' is to speak of each of these Principalities, in all their divisions and subdivisions; and to point out the means of sustaining them, or rather the modes in which they have usually in fact been acquired and maintained. The chief design, however, is to instruct those who have newly acquired dominions, either by usurpation or by conquest.

The maxims and examples set forth as the rule of conduct of a New Prince, are such as only fiends could dare to recommend to beings of a like nature. They inculcate, without the least disguise, a craft the most refined, a perfidy and oppression without any limitation but that of policy. A few of these maxims for princely instruction, which we shall state in substance, will unfold the character of a work either unparalleled in wickedness and effrontery, or unequalled in keen satire.

1. One should either keep upon good terms with others, or crush them utterly, when once provoked; for if the injury that you do them be slight, you leave them in a capacity to return it; but if it be done to the purpose, their power to harm you is gone. So that, when a man

resolves to injure another, he should do it in such a manner as cuts off all possibility of retaliation.

2. A prince who contributes to the advancement of another, is the cause of his own diminution; for he who has been thus advanced, will ever grow jealous, and at last suspicious of that power to which he owes his exaltation.

3. The new prince ought to extinguish the whole family of him who reigned before the acquisition.

4. A conqueror should establish his residence in his new dominions, if he would make his possession secure; or he should establish several colonies in his new dominions, if they be not annexed to the old one.

5. A prince should gain the confidence of the neighbouring petty states; protect them against one another; then sow discord among them, so that he may be enabled to exalt or depress which of them he pleases.

6. Newly conquered states, who formerly enjoyed liberty and their own laws, can be secured only in three ways: first, by destroying or ruining them; secondly, by their new master residing in person among them; and thirdly, by letting them enjoy their former laws, but upon condition of their paying tribute, and having a council of their own citizens (appointed by the prince) who shall be responsible for all that is due to him.

7. Men are fickle and inconstant. It is therefore necessary to be in a condition to make them believe by force, when they will no longer believe of themselves.

8. Whoever imagines that the merit of new obligations will extinguish the resentment of former injuries and disgusts among great men, will find himself, at last, egregiously mistaken.

9. Whoever would secure himself in a new principality, against the attempts of enemies, and finds it necessary to gain friends, to surmount obstacles either by force or fraud, to make himself beloved and feared by his people, respect-

ed and obeyed by the soldiery, to extinguish all such as can, or may oppose his designs, to abolish old laws and customs, to introduce new ones in their room, to be severe, grateful, liberal and magnanimous, to disband an army which he cannot trust, and such like; he cannot have a better model than the Duke Valentine.

10. The prince should give himself wholly up to war-like occupations, more assiduously, too, in time of peace than in war. This should be done by continually employing his bodily and intellectual faculties. He should accustom himself to hunting, and to minutely exploring the country; and he should enlarge his mind by a careful study of history, and, above all, should ever have before his eye, as a model for imitation, some renowned general.

11. It is absolutely necessary for a prince who would support himself, to learn not to be good sometimes, and to make use of that knowledge upon occasion, and as the exigency of his affairs may require.

12. If it is not possible for a prince to avoid those vices which are called infamous, it is not worth his while to trouble his head about it, nor to embarrass himself in endeavouring to escape the scandal of those vices, without which he could not support his state.

13. Is it better for a prince to be loved, or feared? One would desire to be both; but since that is difficult to be accomplished, it is safer to be feared.

14. If a prince be at the head of a numerous army, he must make little account of being thought cruel: for if he has not that character among his soldiers, they will never be kept in due order, nor be fit to be led to any enterprise.

15. A prince ought to know how to resemble a beast as well as a man, upon occasion.

16. It is not necessary for him to be actually possessed of all the good qualities before mentioned; but highly so, that he should have the appearance of them.

17. All men are wicked and faithless, and will not keep their engagements with you. You, therefore, are not obliged to keep yours with them.

18. Those who know how to dissemble, will always find simple people to practise upon.

These maxims might be greatly increased, but they are sufficient to show the keen and deep satire of the work; a conclusion which a careful perusal of the entire work will be apt to confirm.

Machiavel not only well knew the infamy of Borgia's character, but was acquainted with his disastrous end, long before the 'Prince' was written. He had previously declared his unfavourable opinion of that monster; and in various parts of the work under examination, he mentions his acts, and states him to be a model, in terms which cannot be misunderstood; they are manifestly ironical. We think the weight of authority, also, is on the side we have espoused. And as to the singular notion of Stewart and Sismondi, that the 'Prince' was written without any fixed design, but through melancholy, there are no internal or external evidences of that fact.

Having, we fear, dwelt too long on our remarks on Machiavel, we proceed to speak,

2dly. OF HARRINGTON. This eminent political writer was born in the year 1611. During the differences between Charles and his parliament, Harrington had to struggle between his affection for the king, who had been uniformly kind to him, and his republican principles, which inclined him to the parliament. He took, however, no active part in the civil wars, and after Charles's misfortunes, his commiseration for his fate was such as to occasion his dismissal from office. He was too honest, too sen-

sible, and knew too well the nature of political and civil liberty, to repose much confidence in Cromwell. During the Protectorate he retired, for a time, from public view, and engaged himself in the composition of the *Oceana*, a work on which his fame has chiefly reposed. Though no friend to Cromwell, he was a zealous advocate of rational liberty; and for the propagation of his republican principles, he instituted the famous debating society called the Rota, which met every night to discuss questions, with the view chiefly of trying the public feeling on various political points, at that time of great moment. 'In this society,' says Anthony Wood, 'their discourses about government, and of ordering a commonwealth, were the most ingenious and smart that ever were heard; for the arguments in parliament were flat to those. They had a balloting box, and thus voted how things should be carried, by way of essay, which not being used or known in England before this, the room was every night very full.'*

A favourite doctrine of this society was rotation in office, effected by ballot, which, though it was popular, the parliament was generally unfriendly to. One of the members of the Rota proposed this to the house, and argued that unless parliament should embrace that species of government, it must be ruined. Wood says that 'the model of it was, that the third part of the house should vote out, by ballot, every year, and not be capable of reelection for three years; so that every ninth year the parliament would be wholly altered. No magistrate, also, was to continue above three years, and all were to be chosen by ballot; than which nothing could be invented more fair, as it was then thought, though opposed by many for several reasons. This club of commonwealth's-men lasted until February, 1659, at which time the secluded members being restored by General Monk, all their models vanished.†'

* Harr. Works, 25.

† Ibid, 26.

At the Restoration, Harrington entirely secluded himself. He was, however, brought from his retirement and studies in 1661, and committed to the Tower on a charge of treasonable practices. His defence, though triumphant, was not followed by restoration to liberty; his imprisonment was long and severe; which, added to ill health, and the ignorant prescriptions of his physician, occasioned mental derangement, which terminated in death, a very short time after his release.

All of Harrington's works are political, and treat largely of the forms of government, and the philosophy of the political state. Those of his productions which have attracted most notice, after his *Oceana*, are the following:

1. 'The Art of Governing.' It is divided into three books. The author treats, in the first book, of the foundations and superstructures of every known species of government; of the origin of property, whence arises empire; how the balance of empire is created and regulated; of the generation of popular government, and of governments against the balance, as tyranny, oligarchy, ochlocracy. He then speaks of empire, as the result of an over-balance of property, and shows how the form of government is produced by the proportion which this over-balance of property bears to that which remains in the hands of the governed. He holds that if one man against the people, has the balance of land in his favour, three to one, he becomes an absolute monarch. If this over-balance be in a few, or in one and a few, an aristocracy, or a regulated monarchy will be generated; and if the people have this preponderance of property, or if neither one nor a few have it, this will give rise to a popular form of government. The learned author then proceeds to consider the variations of this balance in England, from its earliest history to his own day, and the fixation of this balance, that is of the Agrarian system. This book is concluded with an account of the po-

licy and fundamental principles of many of the governments that have existed.

In the second book of this treatise, Harrington speaks of the commonwealth of Israel, and shows that this species of government was known prior to that of Israel. In the last book, he gives the theory or outline of a popular government, and considers the civil, religious, military and provincial branches of a supposed popular government.

2. 'The Prerogative of Popular Government' is his next treatise worthy our notice. This is divided into two books. The first consists of a reply to certain objections which had been made to his *Oceana*. These he considers under twelve heads. The topics are as follows:

1. Whether the art and the forms of government, which he calls Prudence, be rightly distinguished into ancient and modern.

2. Whether a commonwealth be correctly defined to be a government of laws, and not of men; and monarchy a government of some man, or a few men, and not of laws.

3. Whether the balance of property in land be the natural cause of empire.

4. Whether the balance of empire be correctly divided into national and provincial.

5. Whether men have a common right or interest, distinct from the parts taken severally, and how, under governments, this may be distinguished from private interest.

6. Whether the *Senatûs Consulta*, or Decrees of the Roman senate, had the force of laws.

7. Whether the Mosaic law were obligatory merely from the command of God, or became so by the consent or vote of the people of Israel. That God was the *Chirotonized*, or chosen ruler of the people. That *Chirotonia* is an election by the suffrage of the many, and *Chirothesia* a similar choice by a few; and that the *Chirotonia* among the Jews, was changed to the *Chirothesia*.

8. Whether a perfect commonwealth be not a perfect form of government. He defines such a government to be one established upon an equal agrarian; and arising into three orders, viz. the senate debating and proposing; the people resolving; and the magistracy executing; accompanied with a rotation, through the *Chirotonia*, or suffrage of the people given by ballot.

9. Whether a monarchy, perfect in its kind, does not fall short of a perfect polity. On this point, he contends that there are only two kinds of monarchy, one by arms, the other by a nobility: that the inherent infirmity of the former is, that those in arms, whom he calls the Janizaries, will have frequent interest, and perpetual power, to raise seditions, and destroy the magistracy: and that the like inherent vice of a nobility is, that they possess the frequent interest, and perpetual ability, by their retainers and tenants, to excite seditions, and levy wars. Whence he concludes that monarchy, reaching even its utmost perfection, is not a perfect form, but that it must ever have dangerous flaws in it.

10. Whether a commonwealth has ever been conquered by the arms of any monarch, except where the people have proved faithless to themselves. This question he resolves with much confidence, and an equal display of learning, and concludes that a commonwealth is a government which, from the beginning of the world to the present day, hath never been conquered by any monarch: for, says he, if the commonwealths of Greece came under the yoke of the kings of Macedon, they were first broken by themselves.

11. Whether an agrarian law, or some one of that nature, be not essential in every commonwealth; and whether this law, as set forth in Oceana, is not equal and satisfactory to every interest in the state. On this subject he displays much learning and ingenuity, and would be read with

pleasure and advantage, did he not convey them in a style worse than any that can well be conceived.

12. And lastly, whether rotation in office be essential to a well regulated commonwealth. In this inquiry, the governments of Israel, Athens and Venice are examined by him with great minuteness; and, as he conceives, they justify the principle of rotation, as it is established in Oceana.

The second book of this work is divided into five chapters, the subjects of which are rather curious than practical. He institutes a learned research into the true import of *Chirotonia* and *Chirothesia*, and shows how the former is deduced from popular government, and the latter from monarchy and aristocracy; and that most of the cities of Asia Minor were under a popular form of government.

3d. 'Valerius and Publicola' is another work of this writer, to which we desire briefly to advert. This is a somewhat spirited dialogue on the true form of a popular government. Harrington's most favourite doctrines, found in his other works, are here brought into review. The style is more easy than in the productions we have noted, and the dialogue is, we think, decidedly more instructive than many to be found in the works of the Divine Plato.

4th. 'Aphorisms.' These are among the most valuable of his works: they contain, in short and well expressed sentences, the substance of nearly all that he has written. They are embraced in two treatises; one under the name of 'A System of Politicks delineated in Short and Easy Aphorisms;' the other under the simple title of 'Political Aphorisms.'

There are two other works of this distinguished friend of liberty, which we shall merely name, though they have considerable merit. We allude to his 'Seven Models of a Commonwealth,' and the 'Rota, or a Model of a Free State.'

I fear that I have trespassed too long on the patience of the class, without having accomplished my main design, which is to speak with some minuteness of his most celebrated treatise, to which I now proceed.

5th. 'The Commonwealth of Oceana.' This is a species of political romance, in imitation of Plato's Critias, or Atlantis. It exhibits an ideal republic, somewhat after the manner of the imaginary republics of Hippodamus, of Plato, and of others among the ancients; and of the Utopia of Sir Thomas More.

We propose to give a brief analysis of the entire work, stating its leading doctrines, so that the industrious student may have a foretaste of a production of which every scholar in political science, especially in this country, should be ashamed to confess himself ignorant. It must be admitted, however, that an outline of it may prove necessary, as its style and arrangement are uninviting, and some of its topics ill suited to the taste of the present day. Oceana is divided into four parts, viz.

1. 'The Preliminary.' This is itself divided into two parts. These preliminary discourses state the principles, origin and operation of every species of known government, be it simple or mixed, pure or corrupt.

The 'First Preliminary' treats more particularly of these forms of polity which existed prior to the establishment of the Roman empire. The origin of empire, as it flows from the preponderance of landed property, whether in particular orders, or parts of a community; the operation of the Licinian or Agrarian laws; the election to office by the ballot of the people; the principle of rotation in office; and the comparative merits and defects of the various schemes of polity; are all treated with great learning, and with more perspicuity than usually belongs to the productions of this writer.

The 'Second Preliminary' speaks of the principles of modern governments; that is, of those which arose after the fall of the Roman empire. The various Gothic constitutions are then examined, and the government of England under the Romans, Saxons, Danes and Normans, down to the decapitation of Charles I., is advantageously set forth. In this discourse we also find a masterly history of the origin of feuds, and of the feudal tenures; of the distinctions of ranks, and the several kinds of nobility. It concludes with displaying the causes of the dissolution of the Norman monarchy under the first Charles, and the generation of that light of liberty which, ever since that memorable revolution, has continued to shine with increasing lustre, and more expansive rays.

2. 'The Council of Legislators. The second part of Oceana has this title. In this division of the treatise we have a concise account of the mode in which the commonwealth of Oceana was formed, and of the personages to whom the reorganization of its constitution was entrusted. We are informed that this new polity was the result of the deliberations of nine legislators, who are introduced to us under feigned names. They are stated to be intimately acquainted with the merits and defects of the several governments which they are sent to represent in the Council. The commonwealths thus represented are the nine following, viz. 1. Israel, 2. Athens, 3. Sparta, 4. Carthage, 5. Achaia, Ætolia and Lycia, 6. Rome, 7. Venice, 8. Switzerland, 9. Holland. This council of august legislators is opened by one who is called Lord Archon. In the oration spoken by him on that occasion, he urges the necessity of discarding all fancy and speculation in the great work in which they were then to be engaged, and of resorting to the archives of ancient polities, that they might thence obtain all requisite wisdom. These councillors having prepared *seriatim et separatim* their views of the several

governments assigned to them for consideration, they were all read to the people by a committee of twelve persons selected by lot, which committee was called the Council of Prytans. The people were then at liberty to present to the Prytans their own suggestions on the views thus submitted to them. The council of Prytans convened in the Pantheon, whilst the Grand Council of Legislators sat in the palace called Alma. The Prytans continued in session during several months, whilst all objections against the model of the new government were argued before them. The Council of Legislators also continued in session, without any disturbance from the people, the Prytans constantly informing the legislators of the people's views. All matters of interest being thus commented on, first by the people, then by the Council of Prytans, and lastly by the Legislative Council, that council, after much deliberation, extracted from the entire subject what they deemed excellent and practical, and thus was formed the model or new constitution of the commonwealth of Oceana, a polity designed by its framers to be immortal, as it was supposed to be as perfect as human means could effect, from the combined wisdom of all ancient and modern prudence, finished and embellished by the cautious reflections of the several councils, on their own, and the people's suggestions.

3. 'The Model or Constitution' is then given, and is, of course, the chief object of the work, the two preceding parts being preliminary information as to forms of government previously known, and as to the mode in which the constitution of Oceana came to be remodelled. A full analysis of this constitution would lead us into too much detail: all that we shall therefore aim at, is to present you with such an outline of this important division of the work, as will enable you to understand at least the great features of the government, and to read the whole treatise with more

facility and pleasure than those do who take it up without any previous knowledge of its plan.

The Constitution consists of thirty Articles, which are called Orders, to each of which is appended an explanatory discourse, and occasionally an appropriate speech, delivered either by the supreme legislator, the lord Archon, under the name of *Olphaus Megaletor*, or by some of the other members of the council of legislators. These orations are generally very learned, sometimes eloquent, and the whole form a continued commentary on the more important doctrines of the constitution.

These articles contain a system of government which, as we said before, it will not be in our power fully to unfold to you, as every order contains some important regulation or principle. The people are divided into various classes, as into Freeman, Servants, Elders, Youth, Horsemen, Footmen &c. this latter class being formed of those having an annual income to a certain amount. The people are further divided in reference to locality, or their place of habitation, which creates Parishes, Hundreds, Tribes &c. &c. Those who have been legally declared Prodigals, are excluded from all office, and also from the right of suffrage. Provisions are then made for the mode of elections, for the establishment of a national religion, and full liberty of conscience; for the raising of armies; defence by militia; the encouragement and regulation of trade; the maritime defence; for education in law, physic, divinity, agriculture, polite learning, and, generally, for instruction in all human learning and wisdom. Provisions are also made for the regulation and purity of the drama; the management of all civil and military concerns; the salaries and expenses of government; the well ordering of state pageantry; the police of the Emporium, or chief city; the mode of enacting laws, of promulgating and enforcing them; and finally, for all matters which relate to a well po-

liced community. Throughout the whole, the doctrine is inculcated, that a commonwealth or democratic form of government does by no means exclude degrees or distinctions of rank, and that a nobility and gentry are perfectly consistent with the purest and best secured liberty: for, says Harrington, 'an army may as well consist of soldiers without officers, or officers without soldiers, as a commonwealth, especially a great one, consist of a people without a gentry, or a gentry without a people.'

We have already mentioned that this singular production is a political romance. The author's design is to present a form of government for his own country England, Ireland and Scotland, and likewise a plan of police for the regulation of the great emporium, London and Westminster: but the whole is done under fictitious names of persons and places. We give those names, as they will be found to occur frequently in the work; this will enable the student to read it with a more correct idea of its fictitious plan.

Adoxus,	-	-	-	King John.
Alma,	-	-	-	St. James' Palace.
Convallium,	-	-	-	Hampton Court.
Coraunus,	-	-	-	King Henry VIII.
Dicotome,	-	-	-	Richard II.
Emporium,	-	-	-	London.
Halcionea,	-	-	-	The Thames.
Halo,	-	-	-	White Hall.
Hemesica,	-	-	-	The Trent.
Hiera,	-	-	-	The City of Westminster.
Leviathan,	-	-	-	Thomas Hobbes.
Marpesia,	-	-	-	Scotland.
Morpheus,	-	-	-	James I.
Mount Celia,	-	-	-	Windsor.
Neustrians,	-	-	-	The Normans.
Olphaus Megaletor, Lord Archon,	}			Oliver Cromwell.

Panopœa,	-	-	-	Ireland.
Pantheon,	-	-	-	Westminster Hall.
Panurgus,	-	-	-	Henry VII.
Parthenia,	-	-	-	Queen Elizabeth.
Scandians,	-	-	-	The Danes.
Teutons,	-	-	-	The Saxons.
Turbo,	-	-	-	William the Conqueror.
Verulamius,	-	-	-	Lord Bacon.

4. The last division of the work is called 'The Corollary,' in which are stated the general salutary consequences which may be anticipated from the adoption of the new constitution. These are described as highly advantageous, and picture to us a people moral, intelligent, powerful, prosperous and happy.

This celebrated work had enemies to contend with, even before it was ushered to light; and when given to the world, many exertions were made, by essays and other means, to bring it and its able author into disrepute. These however, as is ever the case with works of great merit, had only a contrary effect; the publick were forced to an acquaintance with its sound doctrines, its learning and ingenuity.

When the book was in the press, some of Cromwell's courtiers seized it, and resisted all his importunities for its return. The disconsolate author then applied to lady Claypole, the Protector's favourite daughter. The part which Harrington acted on this occasion, and the lady's deportment, are thus stated by his biographer.

'Being led into her antichamber, he sent in his name, with his humble request that she would admit him to her presence. While he attended in the anti-room, some of the lady's women coming in, were followed by her little daughter, about three years old, who staid with him. He entertained the child so divertingly, that she suffered him to take her up in his arms till her mother came; where-

upon he, stepping towards her, and setting the child down at her mother's feet, said, madam, 'tis well you are come at this nick of time, or I had certainly stolen this pretty little lady. Stolen her! replied the mother, pray what to do with her? She is too young to be your mistress. Madam, said the author, though her charms assure her of a more considerable conquest, yet I confess it is not love, but revenge, that prompted me to commit this theft. Lord! answered the lady again, what injury have I done that you should steal my child? None at all, said he, but that you might be induced to prevail with your father to do me justice by restoring my child, that he hath stolen. But she, urging that this was impossible, as her father had children enough of his own, he told her at last that it was the issue of his brain, which being misrepresented to the Protector, had been taken out of the press by his order. The lady immediately promised to procure it for him, if it contained nothing prejudicial to her father's government; and he assured her it was only a kind of political romance, so far from any treason against her father, that he hoped she would acquaint him that he designed to dedicate the work to him, and promised that she herself should be presented with one of the first copies. The lady was so well pleased with his manner of address, that she had his book speedily returned to him, and he did accordingly inscribe it to Oliver Cromwell, who, after the perusal of it, said the gentleman had like to trepan him out of his power; but that what he had gotten by the sword, he would not quit for a little paper shot, adding, in his usual cant, that he approved the government of a single person as little as any of them; but that he was forced to take upon him the office of high constable, to preserve the peace among the several parties in the nation, since, he said, being left to themselves, they would never agree to any certain form of government, and would only spend their whole power in

defeating the designs, or in destroying the persons, of one another.’*

Harrington’s ‘Oceana,’ and his ‘Political Aphorisms’ were strongly instrumental in laying the foundation of that fabric of liberty which has been partly raised in England, and which has been nearly completed, and will, we trust, be embellished, in this country. We know of no writer, ancient or modern, who was a more able or zealous champion of the political and civil rights of man, than Harrington. His works, especially those just mentioned, should therefore be attentively read by American lawyers and statesmen. They teem with those salutary doctrines of rational liberty, which so eminently mark the genius of our government. Very many subsequent authors and politicians have been greatly indebted to him, without any direct acknowledgment of their obligations. We shall conclude our remarks on this political writer, with citing the only notice which Mr Hume has seen fit to bestow on him. ‘Harrington’s Oceana,’ says he, ‘was well adapted to that age, when the plans of imaginary republics were the daily subject of debate and conversation; and even in our time, it is justly admired as a work of genius and invention. The idea, however, of a perfect and immortal commonwealth will always be found as chimerical as that of a perfect and immortal man. The style of this author wants ease and fluency; but the good matter which the work contains, makes compensation.’†

3d. OF SIDNEY. Algernon Sidney was of the popular party, in the troubles between king Charles I. and his parliament. A warm friend to liberty, though untainted with enthusiasm, he partook of the republican views of the parliament, and from his hostility to Cromwell, no less than to the exiled family, appears to have been an honest advo-

* Harr. Works, 16.

† Hume’s Hist. Eng. vol. 6, 338.

cate of the people's rights, and of that form of polity which was best adapted to secure them. He is said to have taken Brutus for his model; yet he did not push his imitation so far as to sit in trial among the judges who condemned his sovereign to the scaffold. Sidney was executed in 1683, for his concern in the Rye-house plot, but on grounds so illegal, that his attainder was reversed in the reign of William and Mary. One ground of accusation against him was, the finding in his closet those Discourses on Government which now rank him so high among writers on politics and legislation; and which by some have been thought to be of such singular merit as fully to compensate for the loss of the six books of Cicero *De Republicâ*. These Discourses, in less factious and more liberal times, about 1698 and 1704, were given to the world, and were at one time much read. They manifest considerable learning, sound judgment, and liberal principles; and were the style more agreeable, they would be still read with much pleasure and advantage, notwithstanding subsequent authors, profiting much by these discourses, as also by the works of Harrington, Milton and others, have given to the world productions of a more polished form, and in which have also been displayed those vast improvements in political science which mark the period since the days of Algernon Sidney.

Hume, when relating the trial of this martyr to liberty, remarks of his Discourses on Government, that 'he had maintained principles favourable indeed to liberty, but such as the best and most dutiful subjects in all ages have been known to embrace, viz. the Original Contract, the source of power from a consent of the people, the lawfulness of resisting tyrants, the preference of liberty to the government of a single person.'* To us these doctrines may

* Hume's Eng. vol. 7, 165.

well seem extraordinary grounds for impeaching a man of hostility to subordination and regular government. But Sidney lived in a despotic age, when vice and cruelty were permitted to minister in the temples of justice; he had the misfortune to live in times when his exertions for liberty made him the more obnoxious to persecution from the parasites of the throne; when the infamous Jeffreys was allowed to sit in judgment; and when to deny the divine right of kings, and the necessity of passive obedience in subjects, was little else than rank treason, meriting nothing better than a mock trial and certain death.

Bishop Burnet gives us a character of Sidney which in part accounts for the peculiar odium in which he was held by a people having such crude notions of liberty. 'This strong republican,' says he, 'was a man of extraordinary courage, steady even to obstinacy; sincere, but of a temper that could not bear contradiction; a christian in principle, but averse to all public worship; and an enemy to every thing that looked like a monarchy.'*

The following observations on Sidney's Discourses occur in a letter from John Adams to Thomas Jefferson. 'I have lately undertaken to read Algernon Sidney on Government. There is a great difference in reading a book at four-and-twenty, and at eighty. As often as I have read it, and turned it over, it excites fresh admiration that this work has excited so little interest in the literary world. There ought now to be published in America as splendid an edition of it as the art of printing can produce, as well for the intrinsic merit of the work, as for the proof it brings of the bitter sufferings of the advocates of liberty, from that time to this; and to show the slow progress of moral, philosophical and political illumination in the world.'

We entirely concur in the sentiments of the venerable writer. The intervening period, however, has not been

* Burnet's Own Times.

slow in the progress of moral and political illumination. On the contrary, the seeds disseminated in the works of Sidney, Harrington, and others of those times, have been wonderfully prolific; and more has been done to improve the political and moral condition of man, during the century which has elapsed since these discourses were given to the world, than was effected in all preceding ages.

Sidney was sixty-six years of age when he lost his life in the assertion of his darling liberty.

4th. OF MONTESQUIEU. The fame of Montesquieu as a political philosopher, is founded chiefly on the well known 'Spirit of Laws,' and 'The Cause of the Grandeur and Decline of the Romans,' the latter of which, if inferior in variety of thought and knowledge, excels the former in the closeness and logic of its reasoning. Few works, however, in any age or nation, have contributed more abundantly to the fame of their authors, than the 'Spirit of Laws.' And, with the exception perhaps of Aristotle, no writer, ancient or modern, has entered so deeply into the spirit and genius of government and law, or been so well entitled to the distinguished appellation of the 'Legislator of the Human Race, and the Prince of Philosophical Politicians.'

In collecting information for his great work, Montesquieu visited the greater part of Europe, and published it in 1748. It is the offspring of no less than twenty years' reflection and diligent elaboration; and, as its illustrious author says, should not be judged of by a few hours' reading.

Criticism on so celebrated a production is perhaps unnecessary; it has survived the censure of his enemies, political and literary, and ranks him among the most eminent benefactors of moral and political science. We are sensible that the opinion now expressed of the great merit of this production, is not entertained by all, even of the

present day. He, like his great predecessor Aristotle, has at all times had enemies to his fame, no less distinguished for their zeal than were his friends. He has been, indeed, much praised, but not a little censured. That there are faults in that work, both in doctrine and style, cannot be denied; for what human production is exempt from either? But as long as genius is sublime, as long as learning and philosophy have a just influence, must the 'Spirit of Laws' be regarded as eminent among the productions of genius. The censurers of this work have, in many instances no doubt, been sincere in their criticism; but it is equally true that some of the severity of animadversion has sprung from party prejudice, from zeal in the support of a different theory, and from a fault-finding spirit, too common with many, who are sometimes contented with an ephemeral reputation derived from opposition, however feeble, to the opinions of great masters in science.

In citing, however, the following remarks from an intelligent writer, we by no means desire to apply to his criticism the motives we have just mentioned, though we differ from him in many points. 'We confess,' says the critic, 'if we may venture for once to place our own judgment in opposition to the general voice, that we have not been able to discover in the 'Spirit of Laws' all the merit that is commonly attributed to it. We are inclined to think that it is more praised than read, and more read than understood; and that, instead of making the reputation of its author, it depends upon his great name for a part of its own popularity. Montesquieu was a writer of the highest standing when this work was published; and a great work from a distinguished writer is commonly received with approbation. When we examine it nearly, we perceive a mass of detached observations, but find it almost impossible to discover the plan that connects them together. We meet occasionally with fine thoughts and eloquent passages, but

we seek in vain for the great truths which it is the object of so extensive a work to establish. The book is fatiguing to read, and we rise from it without any precise or definite instruction. The correctness of the distinction taken at the commencement, between the principles of different governments, is extremely questionable; and a considerable part of the differences of situation to which the author attributes the varieties of laws, are consequences, instead of being the causes, of this variety. The chapters on the British constitution, which are among the remarkable passages of the work, contain a theory entirely superficial, and not defended at present by good authorities. The *Spirit of Laws*, like the *Prince of Machiavel*, though in a less degree, has been, from the time of its publication, regarded by many of the best judges as a sort of enigma. Voltaire, who had the art of accommodating his remarks to his audience, observed in publick, 'that the human race lost their title deeds, but that Montesquieu had found and restored them;' a splendid, though not a very definite encomium. But in the confidence of private conversation, he remarked to the Prince de Ligne, that the *Spirit of Laws* was a work above his comprehension. Professor Stewart, in his late *Essay on the Progress of the Moral Sciences*, has resorted, for the purpose of explaining the object of this work, to a supposition similar to that which has been often made in regard to Machiavel's *Prince*. He considers it as intended, in part, to attack established abuses in a covert way, by tracing them to vicious principles.*

It is not my object to vindicate, by any minuteness of criticism, this great work of the immortal Montesquieu. I may observe, however, that if this work has been 'praised more than it has been read or understood,' it has not, we

* *North American Review*, April, 1821.

think, been owing to any intrinsic obscurity in it, but to the deep thought which has distilled, as it were, a vast science, and presented its elements in the form of sententious aphorisms. Much research and anxious thought having been exercised in its execution, it is nowise surprising that this work should require more than ordinary care in its perusal. Those who think deeply, sometimes express themselves with obscurity: this may occasionally be a fault in this great work; but, as a whole, it is comprehensible, and highly instructive. Voltaire's remark was probably intended more as a *jeu d'esprit*, than as a deliberate opinion. In regard to the doctrine which refers the various forms of government to certain principles of action, it is sufficient to observe that, when understood in the sense of Montesquieu, the weight of reasoning and authority is decidedly with him: not, indeed, that a monarchy, aristocracy, democracy &c. cannot be conducted on a different principle from the one ordinarily assigned to it, but that these governments respectively are more apt to be directed by the one principle than the other. It must be admitted, also, that the mere form of government is not that of which Montesquieu is speaking, but the certain outward form, manifested in its usual manner, and guided also by that principle which seems, *cæteris paribus*, the best adapted for its preservation. The form, and its usually attendant principle of action, constitute, according to Montesquieu a defined species of government: but when different principles are fully assumed, the government is no longer identical, though the ostensible form may continue. All, therefore, that is intended by this doctrine of the learned writer, is that particular forms of government do usually in fact conform to certain principles which are not so apt to be the guide of action to other governments differently constituted; and that these particular principles are better adapted to continue those particular forms of po-

lity, than principles of a different nature. It appears to us quite impossible to deny the doctrine, as thus understood. All experience verifies its truth, and all *à priori* reasoning confirms it.

We think, also, that it would detract but little from the large fame of Montesquieu, did we even admit that his views of the British government were in some degree erroneous. We apprehend, however, that this is not the case, and that the 'present authorities' alluded to in the remarks we have just quoted, have been greatly prejudiced in their views of that government, or have derived their opinions of it chiefly from the character which it has manifested long since the Spirit of Laws was written. The mixed form of the British constitution admits of an alternate or occasional preponderance in its various principles; so that it may assume the appearance of either of the simple forms, according to the paramount spirit of the times.

Let me now direct your attention to some very sensible observations on Montesquieu by Mr Farnsworth, the learned translator of the works of Machiavel. Speaking of the great authors of the Spirit of Laws and the Prince, Mr Farnsworth observes, 'As these two writers possess, in my opinion, the highest station in the political scale, it may be worth while to give a comparative sketch of their different characters. Machiavel, born and bred in tumultuous and profligate times, and occupied in the affairs of a distempered republic, caught his first principles from what he saw. Montesquieu, more happy in his birth and fortune, enjoying an early leisure, in a quiet and well regulated monarchy, drew his first principles of politics from what he read. Yet the former was not given up to mere personal observation, nor the latter to mere study: in the progress of life, Machiavel applied himself to books, and Montesquieu to men; yet, as was natural, their first habits prevailed, and gave to each his distinct and peculiar cha-

acter. Hence, though both saw the internal and secret springs of government, (which, in my opinion, no writer but these two did ever fully comprehend or penetrate) yet they saw them by different lights, and through different mediums. Machiavel's leading guide was fact; Montesquieu's was philosophy. In consequence of this, simplicity forms the character of one, refinement that of the other. The speculative Frenchman forms a fine system, to the completion of which he sometimes tortures both argument and fact; the plain and downright Florentine builds on facts, independent of all systems. The polite and disinterested sage is warm in praise of honesty; the active and penetrating secretary, above praise or censure, gives a bold and striking picture of the ways of men. Hence, whilst the first gains every heart by the force of moral sympathy, the latter hath been unjustly detested as the enemy of virtue and mankind. Machiavel is negligent, yet pure and strong; scorning the minute graces of composition: Montesquieu is elegant, yet nervous; and to the acuteness of the philosopher, often adds the fire of the poet. Both were the friends of freedom and mankind; both superior to the genius of their time and country; both truly great: the Florentine severe and great; the Frenchman great and amiable.*

The late Dr Priestley makes the following observations on Montesquieu. 'He is one of the most excellent of all political writers,' says the doctor; 'but his lively manner of expression is sometimes apt to lead his readers into mistakes, if they do not make use of some parts of his works to explain others. Thus, it is too peremptory to say, as he does, that the blood of Lucretia put an end to kingly power at Rome; that a debtor appearing covered with wounds, made a change in the form of the republic; that

* Farnew. Works of Machia. vol. 2, 13, note (h).

the sight of Virginia put an end to the power of the decemvirs; and that the sight of the robe and body of Cæsar enslaved Rome. This is certainly ascribing too much to spectacles, without telling what was the reason why such spectacles, in those particular circumstances, had so much influence; for, as he himself excellently observes, if a particular event, as the loss of a battle, be the ruin of a state, there must have been a more general reason why the loss of a battle would ruin it.* We confess there appears to us little necessity for the objection thus urged by Dr Priestley. Surely a writer, however minute and accurate he may be, and little inclined to leave any thing to the intelligence of his readers, may occasionally use this strong form of expression, without the risk of leading them astray. What tyro in history or political philosophy, could possibly suppose that the sage Montesquieu intended to ascribe those great results to such insulated and insignificant causes? He presumed that his readers would be possessed of the ordinary facts of history, and consequently speaks of proximate causes, of those last and finishing causes, which, though often in themselves very trifling, set all other antecedent causes into active operation. Was it necessary to inform the reader of the Spirit of Laws, why the blood of Lucretia excited the Roman people to terminate kingly oppression; why a debtor, covered with wounds, made the people sensible of their wrongs; why the tyranny of the decemvirs appeared more odious when Virginia was a victim of their power; or lastly, why the exhibition of the robe and body of Cæsar terminated in the slavery of Rome? If all this be necessary, the task of an author would be onerous indeed. He can place no reliance on the knowledge and intelligence of his readers, and must never be content until he has traced up every fact, and tra-

* Priest. Lect. on Hist. 248.

velled through every link of the chain of causes remote and proximate. This so far from being a fault, is often a striking beauty. But to proceed.

Sir James Mackintosh, with his usual felicity of expression, has passed on this work a high eulogium, accompanied, however, with a little more of concession to the Baron's censurers than we should be disposed to allow them. 'Montesquieu has been, perhaps justly, charged with abusing his advantages, by the undistinguishing adoption of the narratives of travellers of every different degree of accuracy and veracity. But if we reluctantly confess the justness of this objection; if we are compelled to own that he exaggerates the influence of climate; that he ascribes too much to the foresight and forming skill of legislators, and far too little to time and circumstances, in the growth of political constitutions; that the substantial character, and essential differences of governments are often lost and confounded in his technical language and arrangement; that he often bends the free and irregular outline of nature, to the imposing but fallacious geometrical regularity of system; that he has chosen a style of affected abruptness, sententiousness and vivacity, ill suited to the gravity of his subject: after all these concessions, (for his fame is large enough to spare many concessions) the *Spirit of Laws* will still remain, not only one of the most solid and durable monuments of the powers of the human mind, but a striking evidence of the inestimable advantages which political philosophy may receive from a wide survey of all the various conditions of human society.'*

So much has been said by various writers as to the merits and defects of the work under consideration, and its errors, real and asserted, have been so fully commented on, that students can be in no danger of imbibing them

* Mack. Intro. Disc. 28.

from the authority of a great name, or from the absence of that criticism which awakens suspicion, and quickens the judgment. While the *Spirit of Laws*, therefore, is read by the student, the statesman, or general politician, with the fullest assurance of deriving instruction and pleasure, they will not be blind to its errors, nor be disposed to listen only to the censures of its opponents. In conclusion, we would remark that, although Montesquieu discovers, and has, we think, pointed out, the principles of preservation, destruction and compensation in most forms of government, it can hardly be doubted that he was a friend, if not to a pure republic, at least to a free form of government. As a man of virtue himself, his declaring virtue to be the characteristic principle of that species of government, is sufficiently indicative, it may be supposed, of his own preference; particularly as he well knew that this is the principle the least arbitrary and factitious, the most kindred to the mind, the likeliest to be shared by all degrees of men, and therefore the most stable and enduring.

Montesquieu's division of government is very simple, viz. into Despotism, Monarchy and Republic; the last of which he subdivides into democratic republic, and aristocratic republic. We shall hereafter have occasion to remark on this classification. His opinion of a monarchy is very delicately hinted. 'As a subject of one,' says he, 'I beg that no one will take this amiss; but I venture to affirm that in a monarchy it is extremely difficult for the people to be virtuous.'

Montesquieu was born in 1689, and died 1755, aged sixty-six.

5th. OF MILTON. While the poetical character of the illustrious Milton has triumphantly vindicated the place which his own anticipations led him to assign to it, his political life and opinions have been the subject of long and shameful obloquy; an obloquy which, to the disgrace of

letters, he owes in great part, in the present age, to the ill concealed intolerance of the distinguished biographer of the British Poets. Of late years, more justice has been done both to the eloquence and sentiments of Milton's prose works; the first lofty, rich and original; the last animated by what seems to be a just love of liberty, and a hatred of tyranny and intolerance in any shape. He belongs to that old school of British prose writers, who, natural, imaginative and eloquent in the highest degree, and with a style which, if somewhat pedantic, is perhaps more interesting than the regular and balanced flow of modern periods, have had the fortune either to be much neglected, or to lend their treasures to those who have omitted to acknowledge the obligation. We on this side of the Atlantic, who are destined to people these vast regions, and to spread and give effect to those rays of liberty which Harrington, Sidney, Milton, and a few others saw, and desired to collect and concentrate to useful purpose; we, I say, of all other people that have ever lived, are the most bound to preserve the fair fame of these martyrs of freedom, and not only to cherish their principles, but to promote the study of their political works. In them are to be found the seeds of that admirable system of rational liberty which we are now enjoying.

Milton lived in unhappy times, when principles true in themselves were shocking to one party from their novelty, and their hostility to their ancient privileges; and were abused by another, whom experience had not taught properly to limit and modify them. But from all that can be gathered amidst the venomous animosities of party, he seems to have been the friend of liberty in church and state, and to have had the love of his country deep at his heart. There was no department of moral truth on which he did not seek to shed information, from treatises for the use of schools, up to expositions of the highest abuses in

government. Thus we find a 'Tractate on Education,' a 'Treatise on Church Government,' his 'Iconoclastes,' 'A Defence of the English People,' 'Reopagitica, or the Liberty of Unlicensed Printing,' a work, it has been said, alone sufficient to embalm him in the memory of his country; 'Sketch of a Commonwealth,' 'A Treatise of True Religion, Toleration, &c.' 'A Scheme of Logic,' and numerous other works, most of which are extremely good, and must have produced a considerable, though a gradual and silent effect.

Milton was born in 1608, in the reign of James I. and died in 1674, in that of Charles II. His character will perhaps be best appreciated by those who recollect that 'mistaken notions and principles are perfectly compatible with elevation and integrity of mind.' There may be some apology necessary for the occasional intemperance and errors of which Milton was guilty in his political life; but the lovers of free government will rank him among the most strenuous of its advocates, and of those writers whose liberality and independence have paved the way to its progress in later times. Let us now proceed to another political writer.

6th. OF JOHN LOCKE. He was one of the four principal philosophers of England, and was born near Bristol, in 1632, in the reign of Charles I. It may not be uninteresting to know that the father of this distinguished champion of constitutional government was himself a firm assertor of liberty in another mode, being a captain in the parliamentary army during the civil war. The writings of Descartes are said to have first given Locke a relish for the study of philosophy, though he did not mainly approve of the sentiments of the French philosopher. Locke also devoted himself to the study of medicine, principally, it is said, for the benefit of his own constitution, which was weakly, but which he preserved to a tolerable age,

seventy-three, through the use of a water diet, and such active exercise as an asthmatic complaint allowed him to take. To his water diet he ascribed likewise the long retention of his eye-sight; for to the last, he could read the smallest print by candlelight without spectacles. This is of such importance to those whose lives are to be devoted to study, that I have deemed it worthy of notice even in the very brief sketch of his life to which I am necessarily limited. It is probable, however, that he was in reality turned to the study of medicine, less by the reason which has been assigned, than a love of all sorts of knowledge; a disposition which led him, not only to the study of the human understanding, but of theology, political economy, and the science of government.

In his works on this last subject, Locke displayed the same unshackled and unprejudiced mind, and the same free principles of inquiry, that have brought his name to the present age, as a metaphysician and philosopher of the human mind. It was not till after the Revolution, namely in 1689, that he published his two *Treatises on Government*, his principles and political friendships having previously rendered him obnoxious to the government of James II. in consequence of which he had retired to Holland. In these treatises he vindicated the principles of the revolution of 1688, and, as his biographer says, 'entirely overturned all the doctrines of slavery.' Shortly after this, he published his '*Considerations on lowering the Interest, and raising the Value of Money*,' essays called forth by the disorders arising from the practice of clipping the coin, and an attempt by the government to raise its value by publick authority. On this subject, which is now also better understood, Locke went before his age, and confuted the opposers of his doctrines, proving his acquaintance with business, and the nature and principles of commerce, as well as with the more subtile and abstract topicks of

metaphysicks. He was in much esteem with King William, who frequently conversed with him on public affairs. He was the intimate also of Lord Ashley, afterwards the celebrated Earl of Shaftesbury, and the tutor of his grandson, the famous author of the 'Characteristicks,' who always acknowledged his obligations to Locke, though he has spoken with much, and, we think, with just severity, of some parts of his Essay on Human Understanding.

It is gratifying to find geniuses so powerful and original as Locke and Milton and Harrington, engaged as advocates of constitutional government. Yet such is the weakness of human nature, and so liable are the most finely turned geniuses to be biassed by the prejudices of their age or condition, or by the peculiarity of their temperament, that it must be confessed there is not much gained to the force of truth by an appeal to authority. Milton, Locke and Sidney could not see the whole truth, or, if they perceived it, such were the prejudices of education, the force of habit, and the control of self-interest, that their writings still manifest some concessions to the friends of monarchy and absolute power, which do not suit the genius of the republics of our own time. Harrington, however, may almost be considered an exception to this remark. He was fearless and explicit, and, for the age in which he lived, his liberal doctrines are truly surprising. It is rather, therefore, to common consent, and the gradual diffusion of sound thought, that we must look for the support of rational and liberal doctrines in regard to government. Individual peculiarity may bias an individual judgment; but the very differences of the many gradually settle into uniformity and certainty: A mortifying truth this to the admirers of genius, who are so little inclined to find imperfections in minds they have so much cause to delight in; but necessary to be remembered, in our deference to au-

thority, and in our estimate of opinion, if we would steer clear of error.

7th. OF HUME. This acute and ingenious philosopher has written his own biography with a modesty very commendable in one who speaks of himself. It is to be regretted, however, that he did not furnish us with more particulars of a life whose philosophical temperance and regularity emulate those of ancient sages. Of such singular equanimity was this first of English historians, that we cannot readily persuade ourselves that he had written with partiality; and if the point be established against him, it is a singular proof that the most phlegmatic temperament is not a preservative against strong prejudices, and that he who is without philosophical, may yet be influenced by personal or party attachments. Hume was born at Edinburgh in 1711, and was intended for the law. His classical propensities soon diverted him from this enterprise, and caused him also to quit in disgust a mercantile concern which he had entered into at Bristol. He therefore retired into France, and there he composed his 'Treatise of Human Nature,' which was published in 1738, with very little success. The first part of his Essays appeared four years afterwards, and was rather more favourably received; but his 'Political Discourses,' and his 'Inquiry Concerning the Principles of Morals,' published in 1752, met with as little notice as his first production, though he regarded them as highly finished compositions. With similar disregard was that portion of his history received, embracing the period from the accession of the house of Stuart to the death of Charles I. and which was published in 1754; nor was it till the subsequent volume appeared, that it began to engage the attention of the publick. Perhaps the history of letters furnishes us with no instance, Milton's poem excepted, in which the first reception and subsequent renown of works, have been so greatly contrasted.

However attached Hume might have been to the tory party in politics, we cannot set him down as an advocate of arbitrary power, or even as unfriendly to republican principles. The firmest attachment to liberty is certainly not incompatible with an apologetic feeling for those whom custom, and the possession of power, caused to look on arbitrary authority as their inheritance, and to oppose the progress of the age as unwarranted innovation. Such was the light in which this able historian regarded the Stuarts; nor does his apology for them seem to me to go further than to palliate their acts, by showing that they exerted the same authority as their ancestors, and stood too firmly on the basis of prescriptive authority, without sufficient regard to the temper of the times, and the change of circumstances. Even able and virtuous men, the heirs of a long exerted authority, may, in such circumstances, come into very unhappy collision with the champions of liberal and rational opinions; and seduced by the notion of legitimate rule, fall behind the progress of the age, and thus incur an odium which, in times less fertile of change, had perhaps taken the form of admiration and love. We must confess, for our own part, as we have elsewhere said, that we cannot but believe with Hume, that regular and constitutional liberty was in Britain the growth of a late age; and that so far from having been diminished by the arbitrariness of the Stuarts, it was, in fact, only opposed by them in its onward progress. We leave this, however, to be settled by more diligent inquiries, our object in these early lectures being rather to awaken inquiry, than fully to satisfy doubts. The question here suggested is at present engaging the literary inquisitiveness of the day. Hume died in 1776, aged 65.

8th. OF FREDERICK II. Though Frederick is not to be classed among the advocates of constitutional government, he was, however, a wise prince, zealous of the hap-

piness of his subjects. Of political liberty his notions were, perhaps, those of an arbitrary king; but so far as equal justice to all, toleration in religion, and ambition to meliorate the condition of his subjects, compose civil liberty, he may be considered as its friend. It was under himself and his father, that Prussia grew to the rank of a principal kingdom in Europe, and attained, in spite of perpetual wars, a great share of commerce, wealth and improvement. Merit, therefore, he undoubtedly possessed; and whether we attribute his zeal for the prosperity of his people to benevolence, or to an ambition to make his resources in war as great as possible through their strength, we must allow him wisdom in the prosecution of his aim. He has been accused, with some justice perhaps, of legislating too much; wasting the means of his treasury in fostering branches of industry foreign to the soil and climate, and beyond the capacities of his people. But, with all his arbitrary acts, his rash speculations, and his unwise intermeddling with the course of commerce; his wars, his literary weaknesses and squabbles, and the hardness of temper imputed to him; few sovereigns have brought to the throne so many admirable qualities for the wise and happy government of their subjects. In such an administration as Frederick's, is observable the difference between civil and political liberty. His subjects were perhaps, to a considerable degree, in the actual enjoyment of the first; but of the last they had none whatever. No king could be more despotic, though it must be allowed that his despotism very generally took a benevolent direction. This monarch wrote a Commentary on 'The Prince' of Machiavel, and as he supposes that treatise to contain the real sentiments of the author, he is not sparing in censure of that celebrated production. As far as an author's works are evincive of sincerity, Frederick has manifested in his Commentary the utmost detestation of the arbitrary and despotic doctrines

said to be inculcated in 'The Prince.' Voltaire wrote a preface to the king's Commentary, in which he remarks, that 'although Machiavelian principles were well refuted in this treatise of the Prussian monarch, the world might one day see a still better refutation of them in the history of his life,' an augury which has not been very gratifyingly accomplished.

In conclusion, we would observe that some little confusion exists in naming Frederick: by the English he is often called Frederick III. by the Germans, always Frederick II. The mistake of the English arises from confounding the Frederick-Williams with the Fredericks of Prussia. Frederick the Great, of whom we are speaking, is properly Frederick II. He was born in 1712, ascended the throne in 1740, and died 1786, aged 75, after a life singularly divided between unexampled military activity, the cultivation of the civic arts, and literary leisure; of which last he has left some monuments, destined perhaps to the same perpetuity as his renown.

9th. OF CONFUCIUS, or CONG-FU-TZE. This was one of those extraordinary men whom virtue, and a kind of directness in moral feeling, seem to lead before their age, to the discovery of truth. Confucius was born of a noble family, at Champing in China, about 550 B. C. He seems to have been the Socrates of the Chinese, and to have applied himself chiefly to moral philosophy, as reducible to practice. He bewildered himself with no abstruse researches into the essence of the first cause, or of the origin of the world, and good and evil; but taught the existence and reverence of a first cause, a pure and perfect essence, the author of all things; and that his providence sees and provides for us, and rewards virtue, and punishes vice. In his books on morals, which have been translated into French, is to be found that comprehensive maxim of morality, 'Love thy neighbour as thyself.' There was never a

higher panegyric passed on man, than the promulgation of this maxim of Confucius by the author of our holy religion, as one half the theme of all the law and the prophets. Another singular coincidence is, that Confucius, like Christ, selected ten of his pupils, to whom he communicated fully his knowledge and his precepts.

Many beautiful thoughts of Confucius are to be found in Goldsmith's 'Citizen of the World.' The extraordinary talents of Confucius early attracted the notice of his countrymen: he was appointed, when very young, to the office of minister of state. His maxims, moral, religious and political, had a wonderful influence for a time; but such was the force of habit, that the people relapsed into their former irregularities. He then devoted himself to private instruction in morals and the art of government. Not being as successful in his teaching as he ardently desired, he sickened with grief at the perverseness of the people. He remarked, 'The kings will not follow my maxims; I am no longer useful on earth; it is therefore time that I quit it;' after which, it is recorded, he became affected by a lethargy, of which he soon died.

More than twenty-three centuries have elapsed since the death of this remarkable philosopher; yet such is the veneration paid to his memory at the present day, that his descendants have conferred on them the title of mandarins, and, in common with princes of the blood, are exempted from all taxes to the emperor. He died in the seventy-third year of his age.

10th. OF BOLINGBROKE. Henry St. John, afterwards created by Queen Anne Viscount Bolingbroke, was born in the year 1672, at Battersea in Surrey, of an ancient and honourable family, which, if there be any merit in it, may be traced beyond the conquest. His youth gave little indication of future eminence; for though his genius and understanding were acknowledged, his love of pleasure had the entire as-

cendancy, and till his twenty-eighth year, he was only notorious for his profligacy, the effects of which, it must be confessed, were somewhat visible throughout his life, and gave a little of its colouring to most of his productions, especially to those on morals. In the year 1700, he procured a seat in the House of Commons, and joining his fortunes to those of the celebrated Harley, afterwards Earl of Oxford, the head of the tory party, he was in 1704 appointed secretary at war. The whigs gaining the ascendancy a few years after, Bolingbroke resigned his office, nor was he returned in the parliament of 1708. During an interval, therefore, of more than two years, he engaged in the severest study, and this recluse period he afterwards considered as the most active and serviceable of his whole life. In 1710, he was again chosen for parliament, and the tory party prevailing once more, he was appointed to the post of secretary of state, which he held during a period of extreme turbulence, and with genius and assiduity seldom united in such a degree.

It was at this period that he negotiated the celebrated treaty of Utrecht, which has been the subject of so much cavil. But Marlborough and the whigs finally prevailing, and George I. succeeding to the throne, Bolingbroke fell into disgrace, and being threatened with impeachment for high treason, withdrew into France. Here he was, for a short time, attached to the Pretender, having been previously attainted at home; but, by a singular fortune, becoming obnoxious to both parties, he betook himself again to retirement and study, and composed during his exile his most celebrated works.

Bolingbroke is the author of many political writings, distinguished by force, ease and elegance of style. Those which rank him among writers of general politics, are his 'Spirit of Patriotism,' and the 'Idea of a Patriot King;' his 'Remarks on the History of England', and his 'Dissertation

on Parties.' His 'Letter to Sir William Wyndham' is a masterpiece. Dr Goldsmith remarks that, as a political writer, 'few can equal, and none can exceed Bolingbroke. As he was a practical politician, his writings are less filled with those speculative illusions which are the result of solitude and seclusion. They prevailed at the times in which they were written, they still continue to be the admiration of the present age, and will probably last for ever.'*

11th. OF THE AUTHORS OF THE FEDERALIST. This work is to Americans an interesting and highly valuable exposition of the Constitution of the United States. I presume that you are well acquainted with the history and character of its distinguished authors, Hamilton, Madison and Jay. I shall, therefore, have but little to say of this work. It was undertaken by them immediately after the promulgation of the federal constitution, being, in fact, a series of newspaper dissertations, designed to expound the principles, and demonstrate the necessity, of the new government of the nation. The labour chiefly devolved on Alexander Hamilton, he being the author of sixty-four of the papers; of the rest, three were written by Hamilton and Madison jointly; fourteen by Madison alone, and five by Jay.

It is seldom that the speculations of philosophers have been so remarkably verified as those of the writers of the Federalist. It is a fact very honourable to the authors of this work, that their opinions of the proposed system, founded on *à priori* reasoning, form an accurate commentary on the practical operation of a scheme at that time but just organized.

Mr Walsh, in a very sensible and interesting review of the Federalist, remarks that, 'though written in a short period, it wears the air of a finished production, and as a

* Golds. Works, vol. 4, 346.

treatise on the science of politics, may claim a high rank among the most profound and luminous which the literature of any nation can boast. The literary efforts of the coalition were eminently successful, and contributed in a sensible degree to the final triumph of the constitution, by force of the soundest reasoning.*

The *Federalist*, we may add, should be studied by every citizen of the republic, desirous of appreciating its institutions and policy. This, together with the luminous and very able opinions of the present chief justice of the United States, on the many important questions of constitutional law which, to the good fortune of his country, it has been his part to decide on, forms an almost complete commentary on every branch of the constitution under which we live, and leaves little to be added by future judges and commentators.

It is unnecessary to recal particulars of the lives of men so familiar to American history, most of whom are your contemporaries. Hamilton is, perhaps, the greatest and most powerful genius of which this country has to boast. His mind was at once strong and elegant, judicious and comprehensive; and his superiority to all other men of his nation was publicly recognized by the man at whose hand the world has to deplore the loss of him. By some it has been supposed that the chastity of style which distinguishes the state papers of Washington, was in some degree the offspring of the touches of his friend and confidant, Hamilton; and his papers in the *Federalist* are certainly distinguished above those of his very able coadjutors, by strength, clearness and brilliancy.

Mr Madison, as a finished scholar, and a learned politician, was no doubt his superior; and in strength and vigour of intellect, nearly his equal; but he was somewhat

* American Review, vol. 1, No. 2, vol. 2, No. 1.

deficient in that practical wisdom and knowledge of the world which so eminently marked the life of Hamilton.

12th. OF JEREMY BENTHAM. This writer, who has made so much noise in our own day, was born in the year 1747. He completed his education at Westminster school, and at Oxford, with much distinction, and he was called early to the bar. Being the son of a very eminent solicitor, and thus probably favoured with an early introduction to business, and possessing, moreover, learning, extraordinary talents, and indefatigable application, he might have had the most complete success at the bar; and, 'could he have persuaded himself to accommodate his political principles to the wishes of those in power, the most splendid station and the highest honours would have been infallibly within his reach.'* It seems, however, that, careless of these advantages, Bentham soon relinquished his profession, and devoted himself to the science of legislation, in which his labours, during more than half a century, were unceasing, and his publications numerous, and generally well received.

Bentham's favourite idea is, that the laws of all nations may, by a process of logical severity, be reduced to their first elements, and that the entire system may be digested, and presented in the form of a written code, so as entirely to abolish judicial legislation, and perhaps nearly to exclude judicial interpretation. This scheme has taken the name of codification, and has been much applauded by some, and equally ridiculed by others.

A true citizen of the world, Bentham has offered his services to various nations in the formation of a code, and has explained his principles in various tracts. He tendered his aid to the National Assembly of France, at the beginning of the Revolution, and wrote on their judicial establishments, their colonies, and the mode of conducting

* Edinburgh Review, Nov. 1817.

the proceedings of the assembly itself, or, as he termed it, its Tactics. He had the same desire in regard to Poland, and in his own country he has availed himself of every occasion to suggest improvements in its policy and laws: thus, he has given his views on the statutes of usury; on the taxes on law proceedings; on the projected reform of the judicial establishments of Scotland; on penal labour; on penal colonization. His greater works are, an 'Introduction to the Principles of Morals and Legislation,' a 'Treatise on Civil and Penal Legislation,' 'Theorie des Peines et des Récompenses,' 'Fragment on Government,' being a critique on some passages in Blackstone's Commentaries; 'Panopticon,' being a treatise exhibiting new views as to the construction of buildings for the confinement of persons of any description who are to be kept under inspection, such as penitentiary-houses, mad-houses, lazarettoes, hospitals, poor-houses &c.; 'Chrestomathia,' being a treatise explanatory of a school for the higher branches of learning, &c. &c.; 'Introduction to the Rationale of Evidence;' 'Church of Englandism;' and 'Elements of the Art of Packing Special Juries.' His works amount to about forty volumes, of various sizes.

Besides these various efforts and labours, he endeavoured to make himself useful to two nations of very opposite characters, but who united in neglecting his offers. He addressed himself, in 1814, to the emperor Alexander, offering to form a code, an object which has in some degree occupied the Russian sovereigns ever since the year 1700. The emperor's reply to Mr Bentham did not correspond to his views, so that he declined making any further proposition to his majesty on the subject. This, we think, is much to be regretted, as it is impossible to doubt that much good would have resulted from Mr Bentham's labours. Impressed with the evils of our unwritten law, as far as it is based on the English common law, and also the

imperfections of our statute law, Mr Bentham, as early as October 1811, addressed a letter to president Madison, containing a similar offer, viz. to reform and codify our laws. Five years after, the president acknowledged the receipt of this letter, but informed him that it was not within the scope of his functions to accept the offer. The republic of Geneva, however, appointed Mr Dumont, his disciple and translator, to prepare for them a penal code. What progress has been made in this enterprise, we have not yet learned.

The character of Bentham has been variously estimated by friends and foes. It must be conceded on all hands, that he has been a zealous propagator of his philosophy, and has laboured in what he conceived to be the cause of morals and sound government, with an utter disregard of ordinary emolument. His admirers predict that, whatever may be his success with his contemporaries, to remote ages and uncivilized nations he will be a teacher and a legislator. By others he has been ridiculed as an enthusiast and a visionary. Nothing, indeed, can exceed the reproaches which have been thrown on him by the government party in Great Britain, which, however, may argue but little against him. How much of this reproach arises from his intemperance in party politics; how much from his exaggerations of the corruption and profligacy of the times, and of publick men and professions; how much from the acknowledged pedantry and involution of his style, it is difficult to estimate with any exactness. He certainly possesses the learning and wisdom, but wants the temper of a philosopher; and we cannot but think that it was a visionary expectation, that any foreign nation would entrust to a stranger the formation of a code which was to affect their lives, their liberties, and their property; to direct the procedure of their courts, re-fashion their laws, and influence all their habits and institutions. A rejection

of such a proposition would have been anticipated by a sober judgment. Still we highly respect Mr Bentham's motives, and truly believe that he has done some good, and could have accomplished much more had he better known how to offer his services, and had those to whom they were tendered, better known how and to what extent to receive them. The truth is, that this philosopher has already met the fate of many who have been pioneers in schemes of improvement. The world receives their labours, and beholds their zeal with cold ingratitude, whilst, at the same time, many of their valuable ideas are adopted, and variously fashioned, often without the least acknowledgment, and sometimes even with reproaches against them for being closet philosophers, and mere visionaries, meditating 'in nook monastic' on matters of the greatest practical interest to the world.

We shall close our remarks on this interesting writer on legislation, with a portrait of his character, as it has been drawn by one of his recent biographers. The anonymous author of 'The Spirit of the Age' thus speaks of him: 'Mr Bentham is very much among philosophers what La Fontaine was among poets: in general habits, and in all but his professional pursuits, a mere child. He has lived for the last forty years in a house in Westminster, overlooking the park, like an anchorite in his cell, reducing law to a system, and the mind of man to a machine. He scarcely ever goes out, and sees very little company. The favoured few who have the privilege of the *entrée*, are always admitted one by one. He does not like to have witnesses to his conversation. He talks a great deal, and listens to nothing but facts. When any one calls upon him, he invites them to take a turn round his garden with him, and thus you may see the lively old gentleman, his mind still buoyant with thought, and with the prospect of futurity, in eager conversation with some opposition-member, some

expatriated patriot, or transatlantic adventurer, urging the extinction of close boroughs, or planning a code of laws for some 'lone island in the watery waste,' his walk almost amounting to a run, his tongue keeping pace with it in shrill, clattering accents, negligent of his person, his dress, and his manner, intent only on his grand theme, Utility; or pausing, perhaps, for want of breath, and with lack-lustre eye, to point out to the stranger a stone in the wall at the end of his garden, 'Inscribed to the Prince of Poets,' which marks the house where Milton formerly lived, &c.' The author then proceeds: 'There is something not altogether dissimilar between Mr Bentham's appearance, and the portraits of Milton; the same silvery tone, a few dishevelled hairs, a peevish yet puritanical expression, an irritable temperament, corrected by habit and discipline. Or, in modern times, he is something between Franklin and Charles Fox, with the comfortable double chin, and sleek thriving look of the one, and the quivering lip, the restless eye, and animated acuteness of the other. His eye is quick and lively; but it glances not from object to object, but from thought to thought. He is evidently a man occupied with some train of fine and inward association. He regards the people about him no more than the flies of a summer. He meditates the coming age. He hears and sees only what suits his purpose, or some 'foregone conclusion;' and looks out for facts and passing occurrences, in order to put them into his logical machinery, and grind them into the dust and powder of some subtle theory, as the miller looks out for grist to his mill. Add to this physiognomical sketch the minor points of costume, the open shirt collar, the single-breasted coat, the old fashioned half-boots, and ribbed stockings; and you will find in Mr Bentham's general appearance, a singular mixture of boyish simplicity, and of the venerableness of age. In a word, our celebrated jurist presents a striking illustration of the

difference between the philosophical and the regal look; that is, between the merely abstracted, and the merely personal. There is a lack-a-daisical *bonhomme* about his whole aspect, none of the fierceness of pride or power; an unconscious neglect of his own person, instead of a stately assumption of superiority; a good-humoured, placid intelligence, instead of a lynx-eyed watchfulness, as if it wished to make others its prey, or was afraid they might turn and rend him. He is a beneficent spirit, prying into the universe, not lording it over it; a thoughtful spectator of the scenes of life, or ruminator on the fate of mankind, not a painted pageant, a stupid idol set up on its pedestal of pride, for men to fall down and worship with idiot fear, and wonder at the thing themselves have made, and which, without that fear and wonder, would in itself be nothing.'

The foregoing graphic description has perhaps a little too much colouring; but, on the whole, it is no doubt a faithful portrait. It is extremely natural to take a lively interest even in the personal appearance and domestic manners of one who has been so long and so much spoken of as the philanthropic and learned, the highly talented and eccentric Mr Bentham. The length of the foregoing extract will therefore be pardoned.

13th. OF NAPOLEON. The emperor of the French seems destined to attract the wonder of mankind, in whatever aspect he be regarded. It seems a little irreconcilable to those political prejudices which our relations to France during his reign have engendered in some Americans, to view as the modern Justinian, a man long odious to us by numerous infractions of the conceived law of nations. He claims the title of legislator, however, with more reason than Justinian himself, since the code which bears his name was not only his project, but, in fact, the subject of his own consideration and patient revision, and owes to him many of its most liberal and judicious principles.

The Code Napoleon is destined, we think, to bear him far beyond those conquerors to whom his unsurpassed military genius had already more than equalled him; and infinitely beyond those narrow-minded cotemporary princes who have stigmatized him as only a military adventurer, and a daring usurper. In the natural progress of events, they must become wholly insignificant to posterity, and will be known only in connexion with a man whose monuments in morals and the arts will be perpetually present to the eye of all future ages; whilst he will stand in the view of the philosophical historian, and all enlightened politicians, as a genius of the sublimest order, a soldier, a statesman and a lawgiver; not without great faults, yet more free from gross vice than perhaps any other prince possessed of unlimited power, and who stood at the head, not only of military, but of all civil and political rule. His instrumentality in the formation of the code which, by eminence, bears his name, (*The Code Civile*) and the four other codes, viz. *Code de Procédure Civile*, *Code Penal*, *Coded'Instruction Criminelle*, and the *Code de Commerce*, was immediate and active. The original draft of the civil code, prepared by the commissioners appointed for that purpose, was reported by them in 1801, during the consulate of Napoleon, to the court of cassation or errors, and, after their suggestions were made, passed to the review of the council of state. In this last body the first consul presided; and in it every part of the proposed code was discussed. It was then presented to the tribunate, where it underwent another discussion, and was then returned to the council of state. Thus were the five codes prepared and elaborated, and it appears from the debates in the council, that the future emperor partook largely and prominently in them, suggesting, altering and amending with much care and anxiety. These facts demonstrate the versatility and magnificence of his powers, and justify his pride in

the creation of this New Code of the Empire. It appears from many passages in O'Meara and Las Cases, that he viewed this enterprise with great complacency; and Butler observes in his *Reminiscences*, that a friend of his had heard Napoleon say that he wished to be buried with his code in his hand. Doubtless he will live in the minds of posterity as long as the work remains in their hands; and whilst his military achievements must command the wonder of future times, his extraordinary ability in civil rule, and his unwearied attention to the minutest details of government and law, will be regarded as the brightest trait in his history.

We have been thus particular because it is, we believe, a very common impression that Napoleon's only agency in the work, was ordering it to be composed by jurists of his nation, and giving it his signature when completed.

Such is the brevity of these codes, that sometimes the whole five are seen printed in one duodecimo volume. The Code Civile is comprised in 2281 paragraphs, each about as long as a Bible verse. This is the instrument which regulates the tribunals of a populous and enlightened kingdom, and with effect and advantage; and such is one of the benefits for which mankind is indebted to the emperor of the French.

But a very important and interesting part of this great work, are the discourses of the councillors of state, called *Motives of the Codes of the Empire*. These contain a succinct and luminous discussion of the various principles and provisions of each code: they are a commentary upon the history and philosophy of many of the laws, and manifest the learning, ability and zeal of those enlightened men to whom this great task was assigned. Most, if not all of the Codes and *Motives*, have been translated. The Code de Commerce, and its *Motives* have been translated by Mr

Rodman, with great ability. It has also been translated, (as well as the Penal Code) by Mr. Duponceau, a civilian of our own country, of distinguished talents and learning: both of these are to be found in the second volume of Mr Walsh's American Review.

We have now brought to a close our brief examination of the works and lives of some of the most distinguished among the ancients and moderns, who have contributed to enlarge and illustrate the important science of political government. This short notice of their opinions, their productions, and their lives, may serve to stimulate the young inquirer after knowledge to deeper researches. We have aimed merely to facilitate his labours by designating for him the paths he should pursue.

We now proceed, according to our plan, to the remaining topics of the present lecture.

(4.) A further division of civil governments, and a proposed classification of all forms. We have stated many divisions of the forms of government among the ancients and moderns, as they have been displayed by their legislators, and their philosophical-writers. We have seen that Machiavel and Montesquieu make very simple divisions, the first, into principalities (or monarchies) and republics; the second, into despotisms, monarchies and republics. Neither of them, we think, answers the purposes of classification: that of Machiavel is not sufficiently comprehensive, and Montesquieu's is doubly defective, as it neither distinguishes polities according to the distribution of their powers into few or many hands, nor, while it mentions one corruption, does it mention all. According to the first principle, he should have included aristocracy in his arrangement, and have omitted despotism, or, adopting the second, he should have noticed, as the ancients did, oligarchy and ochlocracy, as well as despotism. Montesquieu does indeed subdivide republics into democratic and aristocratic: but an aristo-

cracy, considered as an elementary form, differs little from a monarchy, and if it be an aristocratic republic, it can scarce be conceived of as a simple form.

If classification be useful, it should be based on such principles as will refer every conceivable form to its proper head. We propose, then, to rank all known or conceivable forms of government under the following heads.

I. PURE AND SIMPLE, viz.

1. Theocracy.
2. Patriarchy.
3. Simple Monarchy.
4. Simple Aristocracy.
5. Simple Democracy.

II. PURE AND MIXED, viz.

1. Monarchy combined with aristocracy.
2. Monarchy combined with democracy.
3. Aristocracy combined with democracy.
4. Monarchy, aristocracy and democracy combined.
5. *Quasi* mixed Republic, or *quasi* mixed Democracy, in which the various principles rather than the governments are combined.

III. CORRUPT AND SIMPLE, viz.

1. Despotism or tyranny.
2. Oligarchy.
3. Ochlocracy.

IV. CORRUPT AND MIXED.

¶ Either of these governments may be

1. Single.
2. Confederate.

We shall not dwell with much particularity on the foregoing division, in which there is nothing really new, or which requires illustration by historical or other examples. It will be proper, however, to say something in vindication of it, and to explain what is meant by some of the terms used.

To the first five forms, are attributed purity and simplicity. By pure we mean that the sovereign power is exercised mainly or entirely for the happiness and glory of the governed; and by simple we mean that this power resides in only one functionary or depositary, though perhaps in more than one individual. In our second cardinal division we find the same purity in the forms; but they are mixed, that is, they are constituted of two or more of the simple forms of government, variously combined. Thus, the sovereign power may be lodged in an individual, with high and special prerogatives, and also in a council or other body, selected for their wisdom, birth, property, valour, piety, or other eminent qualities. This is a combination of a monarchy and an aristocracy. It is obvious that this mixed form may itself be so variously modified as to approximate very closely to monarchy, aristocracy or democracy, according to the preponderance given to either of the two constituent parts; for if the aristocratic branch be numerous, and be chosen by the people, or by themselves, the government will be more democratic than where that branch is small in number, hereditary, or selected by the monarch. The second form of mixed government is that of monarchy and democracy. This is a form little likely to occur, since the power of the crown can scarce be maintained against the encroachments of the people. It is, however, not only a possible form, but one which has existed. So, thirdly, an aristocracy may be combined with a democracy. Certain prerogative or transcendental rights and powers may be vested in a few, that is, in an aristocracy, whilst the people are permitted to enjoy many important powers. The fourth combination is said to be illustrated by the British constitution, in which the three simple and pure forms of government are so united that each may act in its appropriate sphere, giving efficiency to

all, whilst each is kept within its prescribed limits by the vigilance of the others.

The last form of mixed government we have enumerated, requires a little more explanation, as it is exemplified by our own government, and should be, as it easily is, distinguished from the preceding, in which the three simple governments are themselves combined, while in ours the combination is merely of some of the principles of those three simple forms. In the American constitution, the powers of monarchy, aristocracy and democracy may be said to be virtually exercised, and yet we have no monarch, no aristocratic functionaries, nor do the people, in proper person, exercise any governmental power. This, perhaps, would be unnecessary, as far as the word democracy is concerned; for by a democracy we may mean either the actual exercise by the people of legislative, judicial or executive powers, or simply that these powers are all derived from, and dependant on, the will of the people, but are exercised by their functionaries. In order to get rid of this ambiguity, or twofold signification, some have been inclined to restrict the word democracy to the case of an actual exercise of these powers by the people, and the word republic to the exercise of like powers by the chosen functionaries of the people. Montesquieu, however, uses the word republic rather differently; he applies it to all cases of pure government exercised by more than one. If the sovereignty resides in the body of the people, he calls it a democratic republic, or simply a democracy; but if that power be lodged in the hands of a part of the people, whether by right of birth, or election, he calls it an aristocratic republic, or simply an aristocracy. The word republic is ever associated with the idea of a government so far free, that the people have at least the eventual means of guarding against oppression. In common use, the word is certainly considered as nearly or quite synonymous with

democracy; and this latter word itself is understood to mean a government of the people, exercised by their functionaries. There being, then, a manifest difference between those forms of mixed governments of which we have spoken, viz. where the combination consists of an actual union of the very governments themselves, and our own mixed government, in which the mixture is of some of the *principles* of the simple forms, it appears to be not only necessary to bear in mind this distinction, but also to designate such a mixed government as ours, by some special or appropriate name. Under the British constitution there is a king, lords and commons; there is a union of monarchy, aristocracy, and one kind of democracy. We have a president, secretaries, senate, and house of representatives, which in some degree correspond to the three elements of the British government. In England, the sovereign power resides in the three public functionaries we have mentioned: in the American government, it is said to reside only in the people. The president is not a monarch, nor are the secretaries and senators aristocratic bodies; yet the president is in a great degree directed in the exercise of his powers, by the principles which designate a monarch, and his powers are mostly those which characterize a monarch. So, the secretaries and senators have some features in common with aristocratic bodies. Shall our government, then, come under the fourth division of the second head, viz. of 'Pure and Mixed Government,' combined of monarchy, aristocracy and democracy; or shall a new class, and an appropriate name, be selected for it, so as to convey the idea that it is called mixed merely from its approaching in its elements or principles the mixed form we have just mentioned as exemplified by the British government? Or, on the other hand, as it is not a mixture of the actual simple forms, but of some of their principles, shall our government be ranked with Simple go-

vernments, on the plea that, as all sovereignty resides in the people, and is merely exercised by their functionaries, it must be simple, and comes therefore under the last head of the first division of our classification. A reply to these questions is perhaps of no very great moment; it cannot be made, however, until we ascertain precisely what is meant by a simple government. If by a simple government we mean nothing more than that the ultimate sovereignty resides no where but in the body of the people, and that the exercise of delegated powers by their functionaries in no degree impairs the sovereignty, then must our government be classed under the head of simple; and though the agents of the people are so variously constituted as to exercise, in a considerable degree, the three classes of powers which seem to characterize all the three simple forms, yet must the government still be simple, and not mixed. So, again, if by the word mixed we mean that the three, or any two of the elementary or simple governments are themselves combined, then must our government still be simple, since we have neither monarchy nor aristocracy. If, on the other hand, a government is to be considered as simple or mixed, according as its ordinary powers are actually administered by one or more bodies, without reference to the residence of its ultimate sovereignty, then is our government a mixed one, because the governmental powers are partitioned out, and lodged in distinct and independent bodies, although the sovereignty remains with the people, from whom all power originally flowed, and continues to flow. Hence, a government may be a mixed one in two ways; first, where the combination consists of two or more of the simple governments themselves; or secondly, where the general characters, and leading principles of two or more of these simple governments are united in several bodies. The first of these mixed governments is exemplified by Great Britain, by most of the

European governments, and indeed by nearly all the pure governments which have ever existed. The second kind of mixed government is exemplified by our own constitution, which is a combination of principles characteristic of the three simple forms, and so disposed of in various organs, as to create the same responsibilities, checks and balances which we find in a combination of monarchy, aristocracy and democracy, though we have in reality neither the one nor the other.

If this view of the subject be correct, there should be a name or expression introduced to distinguish these two distinct classes of mixed governments from each other; and there should also be some appropriate name given to such mixed governments as are composed of the simple forms, according as the one or the other preponderates, so that the three combinations of the simple governments might each be known by an appropriate name. Thus, for example, the British government might be called a mixed monarchy, taking its name from its preponderating feature. The government of Venice, during most of the time of the doges, might be denominated a mixed aristocracy; and the government of Rome, under the consuls, and particularly after the establishment of the tribunes &c. and that of Athens, particularly under the annual archons, would exemplify a mixed democracy.

In order to distinguish this sort of mixed governments from those in which the mixture consists of various principles of each, the same phraseology may be retained, with the addition, however, of the adjunct *quasi*, if this be not too unusual or pedantic. Thus, our government might be called a *quasi* mixed democracy; the first word to denote that the combination differs from that which is ordinary, viz. of certain principles instead of the governments themselves; the second word to denote the fact of its compound character; and the last to indicate that the predominant

feature in our polity is democracy. Or, as the word republic is with many a more favourite word, and is often understood to mean that the people govern by their delegates, our government might be called a *quasi* mixed republic. If a government in its organization should have these principles so combined that monarchical or aristocratic features should be the most prominent, it would then be called *quasi* mixed monarchy, or *quasi* mixed aristocracy.

We have said more than was perhaps necessary, in explanation of the first and second of our cardinal divisions of government. In the third, we have designated governments as corrupt and simple, viz. despotism, oligarchy and ochlocracy: and in the fourth cardinal division are to be found such governments, if any, as are corrupt and mixed; these we shall consider together. A mixed government can scarcely become corrupt, in the strong sense in which we use the word, since the very mixture creates such a system of checks and balances as will be extremely apt to exclude that corruption which generates tyranny on the one hand, or anarchy on the other. Those governments, it will be found, which are the most simple in their structure, have been the most exposed to degeneracy and corruption. So, also, those which are pure, are generally the most permanent in proportion to their just admixture of the primary forms of government. To place political rule in the hands of a single person, has been the most general resort of communities desirous of order, and the quiet enjoyment of their property. This simple polity requires no contrivance, no balances of the different powers of the state against each other, in order to restrain each from encroachment. It was natural, too, to small communities, in which the talents of an individual would be likely to be most conspicuous; and it was generally better adapted to their rude and warlike habits. Hence it is not surprising

that it should have prevailed so completely over the other forms of government. But as it was the most easy expedient of communities desirous of police, so it has always been the most liable to abuse. Power can hardly be entrusted to a single man, and not be wantonly used to the oppression, instead of the protection of the state; and hence it has almost uniformly degenerated into despotism or tyranny. It is fortunate, however, for mankind, that even in the most absolute monarchies, certain limits are established by long custom, common understanding, religion &c. to which the worst princes are under some obligation to conform, because the people in extremities, after having endured much within the ample range of despotic power, will be sure to rise and revenge the transgression of what is manifestly theirs by the guarantees just mentioned. In the mild monarchies of Europe, and even in those which amble on the confines of despotism, there has always been some form of constitutional restraint. Thus, the edicts of the French monarch were to be registered by the parliament, before they had the character of laws; and we know that even this weak bulwark against absolute power was repaired to on the eve of the Revolution. Another defence against despotic power, as we have before intimated, is the creation of a nobility. This will appear extremely obvious, when we compare the government of oriental countries, where there is no hereditary nobility, with that of Europe, where this class of depositories of power is so well known. 'No monarch, no nobility: no nobility, no monarch,' says Montesquieu. Hence monarchy, as a simple form of government, has been seldom known, it being generally combined with aristocracy; and if not, it soon becomes corrupt, and takes the name of despotism.

Nearly the same remarks apply to aristocracy, which becomes corrupt, and takes the name of oligarchy, unless it be associated with democracy. Indeed this form of po-

lity is more liable to degeneracy than monarchy; for, as Dr Priestley justly observes, 'as the people have more masters, they are more liable to be sorely oppressed.' The liberty of the people would, I grant, at first appear to be more secure in the hands of a few than of one; but it is to be remembered that a monarch acts on his own responsibility, and in conformity to the dictates of his own mind; whereas an aristocracy divide responsibility, and they corrupt each other. They are often turbulent and distracted in their counsels; faction rises on faction; and whilst they vex each other, they often agree upon nothing but the oppression of the people; for this is generally necessary in order to enable these factions to sustain themselves against each other. The oppression of an aristocracy is also the more galling to the people, as they consider those in power more men like themselves, than they are apt to think a monarch, who is more retired from their observation, and therefore more venerated. That an aristocracy is generally a severe government, and soon assumes the corrupt form called an oligarchy, witness Venice, and also Athens under the Thirty. Witness, likewise, those nations in which the nobility have succeeded in gaining a preponderance over royalty: thus in Denmark and Sweden, after the nobility had triumphed for a time, their power was transferred, with the hearty concurrence of the people, to the king. In fact an aristocracy, which in its primitive nature is the rule of the best, becomes almost invariably the despotism of a few; and the people, instead of having several protectors, have as many tyrants.

Lastly. A simple democracy is, next to a pure monarchy, the easiest form of polity to be fallen into, especially in small states. Its advantages are equality of rights; free scope to the exertion of every man's talents, and equal rewards to his merits; and the adoption of general laws, from which arise security, curiosity, and consequently

knowledge. Were mankind just and virtuous, democracy would, in truth, be the only natural government; we might say, the only lawful one; since all men are bound to combine their talents for the discovery of the best means of promoting the general happiness. That it has not more generally prevailed, that it has even been pronounced absurd and impossible, arises from vice and corruption in the people, from its turbulence and faction, and, above all, from unwieldiness in the force of the state. It is too apt, in short, to degenerate into ochlocracy or anarchy. Thus, then, each of the pure and simple governments appears to have its peculiar infirmities, a monarchy degenerating into a despotism, an aristocracy into an oligarchy, a democracy into anarchy. Sensible of these evils, philosophical politicians have exercised their skill in so combining the simple forms, that the besetting vice of each may be counteracted by some opposite quality of that with which it is combined. In some constitutions you will find the monarchical privileges countervailed by assemblages of the people, the monarch having the executive, the people the legislative power, with the reservation of an absolute or qualified veto to the sovereign. The fault of this combination is, that the interests of the two come too frequently into collision, and there is no third power to trim the balance, and mediate between them. In others, as in that of ancient Rome, the aristocracy and democracy were balanced against each other; and with all the seditions and civil dissensions of the first seven hundred years of the Eternal City, it was a constitution which showed the salutary efficacy of these balances of the civil powers, though chargeable with the defect of too indefinite a limitation of the scope and bounds of each. The modern monarchies of Europe afford us examples of the mixture of all the three simple forms, and are systems of government somewhat different from any that were practised

among the ancients. These forms, now so common, though they were the production of a kind of accident, are better than any that preceded them. History informs you of their origin; how, from their dispersedness, the conquerors, originally entitled to vote every thing in person, were obliged to send deputies, and hence the idea of representation; how the commons, originally vile and enslaved, grew wealthy and powerful with the augmentation of trade and the arts, and then asserted their share in the great council of the nation; and, lastly, how the privileges of king, nobles, clergy and people became so tempered as to check and balance each other, and to subject every public measure to repeated discussion; so that the vigour and promptitude of monarchy in war, might be happily blended with that security of property and person, which characterizes a republic in peace.

The success of the European states has indeed been various in properly combining and balancing the different members of the government; but that of England has been worthy of all praise, and amidst the comparative oppression of neighbouring countries, must not be undervalued because, in a more philosophical age, and under more auspicious circumstances, we ourselves have constructed a yet more free and more symmetrical form of polity. It is the advantage of the federal republic, that while it is large enough to withstand external force, its form prevents the inconvenience attendant on democracies of too great an extent, viz. the unwieldiness of popular assemblies; the difficulty of preserving subordination, and conserving local interests throughout the whole body; and the faction and opposition of interest which almost invariably prevail in them. We may apply the observation of Montesquieu, when speaking of confederate republics, with peculiar propriety to our own. 'As this government is composed of petty republics, it enjoys the internal happiness of each,

and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies.* Our constitution is certainly the completest model of this kind; and every lover of mankind must desire that it shall deserve this encomium from a philosopher such as Montesquieu, and one who wrote before its existence. Since, according to Montesquieu, our confederation belongs to the only species of government of which virtue is the principle; since the honour and power of monarchies, the moderation of pure aristocracies, and, above all, the slavish fear of despotisms, are with us supplied by a better principle; since here the mind best expands into action, thought is liberal, conduct free, property and person secure, and manners independent; we have not only good reason to congratulate ourselves on our political scheme, but are bound by every strong motive of human life, to give it permanency. We have made the experiment on a vast scale; many millions of men are deeply concerned in its success; and all civilized nations are watchful of the event, some with the hope of imitating us, and a few, perhaps, with the dread that our success will prove their downfall.

‘The laws, the rights,
The generous plan of power deliver’d down
From age to age, by our renown’d forefathers,
So dearly bought, the price of so much blood,
Oh! let it never perish in our hands.’

Colo.

* Mont. Spir. of Laws.

LECTURE X.

OF THE FEUDAL LAW.

PURSUING our topics in the order designated in the syllabus, we are now to treat of the elementary and constitutional principles of the Municipal or Common Law of England.

The present lecture will be devoted to an inquiry into the leading principles, the laws, and the institutions of the feudal ages, so far as they are in any degree connected with the system of English jurisprudence.

It will be perceived from the syllabus that the topics of this lecture are too numerous to admit of much amplification. All that can be accomplished consistently with our general plan, is to present an analytical view of the subject, with references to such sources of information as will enable the student to pursue his inquiries with facility and certainty into a system which lies at the very foundation of his future legal studies.

Introduction. The barbarous nations which, between the fifth and seventh centuries, invaded and occupied the provinces of the Roman empire, established a form of polity so different from that of Rome, or indeed any other which had ever existed, that modern history is wholly unintelligible without a knowledge of the systems which they erected. Their scheme of jurisprudence, also, is equally unexplainable without this knowledge; and since the common law of England is in part the offspring of the feudal, the consideration of the general features of the feudal polity is necessary to any clear and systematic inquiry

either into the learning of feuds, as it existed in England, or into that body of law which sprang out of it, and which is usually known as the common law.

We deem this subject so important to the right understanding of many portions of the municipal law, that we shall extend the present lecture much beyond the usual limits, and for the sake of clearness, shall divide it into two parts. In the first we shall present a general view of the feudal system as it subsisted in the various European nations; reserving the second part for a more particular consideration of it as it appeared in England, together with some references to particular topics and questions which are interesting to students of the English laws and constitution, though they could not so properly make a part of a general essay on the feudal establishments.

PART THE FIRST.

Occupation of the conquered lands by the barbarians, and their allotment among the victors. **DIVISION I.** The various tribes which successively poured in upon the Roman conquests, were of so independent a spirit that they conceived themselves not less entitled than the chieftains who had led them, to participate the acquisitions which they had made by their valour. Whatever distinction they made in the degree of remuneration, seems to have grown out of their estimate of the services and conduct of their leaders, rather than to have been made in reference to the regal character; and if the kings gained a larger share in the conquered lands, it was with a view to their merit, and not to their prerogative.

(1.) Of Allodial Property. Every freeman, therefore, who followed his chieftain to conquest, took his share of the territorial spoil as the fruit of his good sword; and he enjoyed it discharged of every service, duty or tribute, except that which was required for the safety of

the state, namely, military service, which he paid, however, as a freeman, and not as a feudatory. Hence his estate was called *Allodium*, which imports a certain share falling to any one by lot, from the two German words *an* and *lot*. These lands were owned by their several proprietors as their absolute property, free from all tenure, and bound by no duty even to the king; for though the allodial proprietors, in common with all other subjects, owed allegiance to the sovereign of the state, it was not in respect of their lands.

These allotments of land among the victors did not result in the total expulsion of the Roman proprietors: on the contrary, the Burgundians and the Visigoths took but two thirds of their respective conquests; the Lombards of Italy, a third part of the produce; the Vandals of Africa, all the best lands; while the Franks, though we discover no mention of a particular apportionment by them, certainly held a great part of the lands of France.

(2.) Of *Beneficia* or *Feuda*. But while every free soldier would esteem himself entitled to a share of his conquests, it was natural that they should reap the largest rewards whose conduct and courage had been most conspicuous in achieving them. Large portions of land were therefore assigned in the distribution, to the eminent chiefs, and a larger to the king, both as the most meritorious soldiers, and as the chief repositories of responsibility, and contrivers of the general plan of conquest; and hence, also, was it that the king, not indeed in virtue of prerogative, had apportioned to him a very large share. The chieftains too, like the king, were necessarily influential from their knowledge and talents. Hence, the king himself would be most anxious to attach them to his person, and to secure their skill and fidelity in the field or in the council. To this end they received from him donations out of his own extensive allotment; and they in turn,

from similar motives towards their own companions, would parcel out these donations, as well as their own proper and original portions, amongst such subordinate freemen. Thus a freeman, whether eminent or obscure, might hold land acquired by two different titles; that is, his own original allotment as a member of the community, which was *allodium*, and another as the gift of some powerful or friendly superior: this last was termed a *Beneficium* or *Feudum*, the latter word being compounded of *feo*, wages or stipend, and *od*, possession or estate; conjointly signifying something that is stipendiary, or granted as a recompense for services to be rendered.*

The allodial proprietors, we have already mentioned, were under no other obligation than that which is due by all subjects to the state; whereas the beneficiary or feudal owners were tenants, subjected to various personal services, to be rendered, generally at stipulated periods, to their lords, and bound to them by many ties of the strictest fidelity. *Allodium*, therefore, created the obligation of allegiance; *feudum* superadded those of fealty, homage &c.

Whether *Beneficia* were ever grantable during pleasure only; and how they became hereditary. DIVISION II. These *feuda* or *beneficia* were originally granted only during pleasure; and Dr Robertson thinks that no circumstance relating to the customs of the middle ages is better ascertained than this.† This opinion, however, which indeed is that which has been held by nearly all who have expressed any on the subject, is questioned by Hallam in his History of the Middle Ages, who thinks that no satisfactory proof has ever been

* Cragii Jus Feudale, lib. 1, sec. 4. Hale's Common Law, Runnington's ed. 107, note (h). Coke Littleton, 64, note 1. Steuart's View of Society in Europe, book 1, ch. 2, sec. 1. 1. Rob. Char. V. 185. Squire's Anglo-Saxon Gov. 25.

† 1. Rob. ch. v, 179. Steuart's Hist. Dissert. 81.

brought of it, and doubts whether beneficiary grants were ever resumable at pleasure, unless in case of some delinquency in the vassal.* Benefices granted for a term of years, he thinks, may have existed, though he is not aware of any documents which prove even this. However this may be, it is certain that fiefs did not long continue precarious, or even limited to the vassal's life; for, indeed, under the first race of French kings, which ended about the year 680, both the laws and the precedents of forms would seem to prove that they had already in many cases become hereditary. Nothing, we think, was more natural than this perpetuity of estates. The motives which prompted favours to a meritorious and useful chief, would be strengthened by compassion for his offspring; and the weakness of the royal authority would often suffer what neither of these principles might have inclined it to bestow.

We have made use of the words *beneficium* and *feudum* as synonymous; but this in strictness is not correct. The word *feudum* is indeed often used, in an enlarged sense, to import any species of feudal estate, without reference either to its precarious or its fixed nature, or to its being granted at will, for years, for life, or as an inheritance. There can be no doubt, however, that there were distinct names appropriated to these various kinds of grant, and they distinguish the progress of the feudal law, in regard to the tenant's estate in the land. Thus, when these estates were altogether precarious, or dependent on the lord's will, they had the name of *munera*; if granted for years, they took the name of *terms*; and when for life, they were called *beneficia*. This was their state generally from the seventh to the tenth century, at which time the perpetuity of these estates was fully established, and they then assumed the name of *feuda*.

* 1 Hall. Mid. Ages, 165

A benefice, therefore, strictly means an estate for life held by a tenant of his feudal lord; and a feud imports a like estate held in perpetuity. Both feuds and benefices were further divided into Proper and Improper, which denomination they took from some circumstance that distinguished them from those generally granted.

A proper benefice was an estate in lands granted to a man during life, and held by fealty, and some uncertain military service. Improper benefices, consequently, were estates in any other things than land, or, if land, held in any other manner than is indicated by the foregoing definition of a proper benefice. The improper benefices may be thus classed.

1. When lands were granted to the church. In this case, the services not being military, and the estate not being for life, as it endured forever, the church being perpetual, the estate was denominated an improper benefice; and if its perpetuity would class it with feuds, it would still be an improper one, as the services were not military.

2. Where the tenant was expressly permitted to take possession of the estate without actually taking the oath of fealty. Here, though the tenant could do nothing against the ordinary requisitions of the oath, yet he could not be compelled to take the oath, unless when the investiture had been merely silent as to the oath of fealty.

3. If the estate might endure longer than the tenant's life, or for a shorter period, the benefice was then also an improper one. As if land were granted to A and B, and the survivor of them, here the survivor was supposed to hold the land, not only during his own life, but also during the life of the other; a principle wholly at variance with the subsequent and present doctrine of the common law, which is, that every man's own life is, in the contemplation of law, a greater estate than any number of lives then

in existence. On this principle, the benefice stated in the foregoing example would be a proper benefice, since the survivor had nothing more than an estate during his own life. So, again, if the life estate might by any possibility terminate short of its expiry by efflux of time, it was an improper benefice; as if an estate for life were granted to A, to be defeated by any condition, or by the happening of any event.

4. If any certain services, military or otherwise, were reserved, the benefice was an improper one.

5. If no military service were reserved, but some rent, it was an improper benefice; hence all soccage estates were improper benefices.

6. If no services whatever, except fealty, were reserved.

7. Estates held by grand or petty serjeantry (the former being referrible to knight's service, the latter to soccage tenure,) were also improper benefices, as the services were in both cases certain.

8. All grants to females, though the services reserved were military and uncertain, were still classed under this head, since the services were to be performed by deputy, and it was essential to a proper benefice, and a proper feud, that the services should be personal.

9. Finally, all things whatever which are from their nature transferrible by grant or contract only, and not by livery of seisin, were held only as improper benefices or feuds. Such things were said to lie *in grant*, in contradistinction to all those which are embraced under the legal notion of land, and which are said to lie *in livery*.

The foregoing remarks on improper benefices, and the criterions by which they are distinguished from proper benefices, equally apply to the distinction between proper and improper feuds; a proper feud being what a proper benefice is, except that the latter is an estate for life, and the former an estate in perpetuity.

How Counts and Dukes made their offices hereditary. DIVISION III. But it was not only the beneficiary estates, but the great offices, which thus changed their nature, and from being granted for life, or during good behaviour, became hereditary in the families of the original grantees. The kingdom of Clovis was divided into a number of districts, each of them under the administration of a Count (the Comes of the Romans, the Graf of the Germans) whose duty was the preservation of public order, the administration of justice, the collection of the revenues, and the direction of the free proprietors when summoned into the field.

A Duke was of still higher authority, and usually had command over several counties. These offices, originally conferred during pleasure, would naturally be affected by the same causes which gave hereditariness to *beneficia* or fiefs; and so, in fact, they appear to have been, even so early as under the Merovingian race of French kings. The Marquisses or Margraves, to whom was entrusted the custody of the borders or frontiers, followed the example of the counts and dukes, and all these officers, both by thus assuming a kind of patrimonial right to their dignities, and by the constant acquisition of private estates within the limits of their jurisdictions, rendered themselves formidable to the crown, and in time engrossed to themselves, and the most eminent proprietors of lands, the right, or at least the power, of electing the Mayors of the Palace, who, from being mere officers of the court, had now become almost masters of the kingdom. Thus, from the union of large landed property with the usurpation of personal dignities for their heirs, the feudal chiefs laid the foundation of that landed aristocracy which is the most peculiar characteristic of the political system of Europe during many centuries, and may in fact be regarded as the strongest feature which distinguishes the despotism of Asia, and the

equality of modern republics, from the feudal polity of which I am now treating.

Causes of the prevalence of feudal over allodial property, and of the rise of Tenures. DIVISION IV. It is evident from the brief account I have given of the mode of dividing the conquered lands practised among the invaders of the Roman em-

pire, that the scheme of polity called the Feudal System, was far from existing among them even for some ages after their settlement. So far was the structure of their states from that series of concatenated dependencies, in which the king being considered as lord paramount, every holder of land beneath him traced his title up to him through successive donors, and which may be illustrated by the familiar image of a tree with its root turned upwards, and its branches dependent; that, in fact, they were assemblages of free and independent landholders, with an elective leader at their head, and who owed no other service, and bore no other badge of dependence, than a contribution of their military assistance to the defence of the community. In these points they resembled many other nations, and it was only from particular circumstances, whose nature and progress it is our intention cursorily to trace, that the extraordinary state of government and manners arose, which we term the feudal system.

Much has been written both as to the history and jurisprudence of the feudal ages. For minute information on these topics I refer you to the researches of Craig, Spelman, Selden, Sullivan, Lowman, Kaimes, Squire, Whitaker, Dalrymple, Gilbert, Wright, Harrington, Hallam, Steuart, Millar, Robertson, Hume, Montesquieu, and many others, who have devoted much time to the laws, manners and institutions of the middle ages. Whether we view the influence which this long prevailing system of laws had on the political and municipal codes of every nation in which it has prevailed, or advert to its effects even on the

jus gentium, or international law of Europe, we cannot but esteem it a subject of the greatest interest, no less to the jurisprudent than the historian.

The origin of feuds, or at least something analagous to them, has been sought, and supposed to be found, in various nations, indeed in the history of almost every nation, from the Jews to the Mexicans. Though partial resemblances to the feudal system may no doubt be discovered in the early history of many nations, and though, for example, the relation of patron and client, in the Roman republic, was somewhat similar to that of lord and vassal, in respect to mutual fidelity; and, to give another instance, though the veterans of the republic received lands on condition of public defence; yet the relation of patron and client was not founded in any degree on tenure, or military service; nor, in the other case alluded to, did the relation subsist between the soldier and his individual lord, but between him and the state at large. On this subject the learned Selden, when speaking of Romulus's institution of patron and client, remarks that 'though there certainly was a bond between the parties, yet it does not appear there was any possession held by that bond.'*

The feudal policy, like the garden of Eden, has been found, as we have said, by fanciful writers, not only in Rome, but in the schemes of government of almost every other nation. Lowman points out a great similarity between this system and that of the Hebrews.† It has been

* Selden's *Titles of Honour*, part 2, ch. 1, sec. 23.

† Lowman on the Civil Government of the Hebrews. Chap. 4.

This opinion is also countenanced by several other respectable writers, among whom is Dr Jennings, in his able work on '*Jewish Antiquities*.' In his inquiry into the origin of tithes, and the reason why the priests and Levites should be thus supported, rather than by allotting to them an inheritance in a portion of the lands, he says that 'the tithes reserved by God to be paid by the Israelites to his priests, might have been designed as an acknowledgment that they had received their estates from the gift of Deity,

found by others among the American Indians; in the islands of the Pacific ocean; among the Britons; and in various parts of Europe and Asia, long prior to the invasion of the Roman empire by the Lombards and other northern nations.

That lineaments of the feudal policy are discoverable in the history of nearly all rude nations, there can be no doubt; but the inferences which have been deduced by some writers from these occasional resemblances, are too wide; and, in some instances, entirely visionary, as we shall have occasion presently to show. We have only to remark at this time, that the Highlanders and the Irish, among whom these traces of feudalism have been supposed to be found, were collected into clans by imaginary kindred, and respect for birth, and not by vassalage. So, in Poland and in Russia, where all the nobles were equal in rights, and wholly independent, and all others were in servitude, we discover something even very opposite to 'the long gradations and mutual duties of the feudal system.' We may add that the dominions of Charlemagne, which embraced France and Germany, and something more; and also England, after the Norman conquest, as well as Naples and Arragon, appear to have been the only countries in which the principles of feudalism were fully developed.

and that they held them by no other tenure, in which view these tithes may be regarded as a quit-rent, to be annually paid to God, the original proprietor of the land, who had conquered it for them, and put them into possession of it. Paying it to the priests and Levites, God's immediate servants and ministers, was paying it to him; and as the Israelites held their estates by this tenure, a neglect or refusal to pay tithes induced a forfeiture of the estate.' The learned author then proceeds to compare this reservation of tithes to the quit-rent reserved by William the Conqueror, who, when he parcelled out the lands of England, reserved a certain small rent, to be annually paid out of every estate to the crown, as an acknowledgment that it was received from, and held under him as a feudal lord. 1 Jenn. Jew. Antiquities, 240.

We have seen already how the kings of the rude invaders of the Roman empire, who had a more ample endowment, and to whom fell the residue, of the conquered lands, sought to attach to their persons and fortunes their more eminent followers, by liberal donations out of their own ample share, over and above the allotment originally made to every freeman. Enriched thus at once by their allodial share, and by the grants of their sovereigns, these larger proprietors, after fixing in their descendants the inheritance of these at first resumable grants, set themselves to securing the attachment and services of their companions and inferiors, by carving out portions to be held of themselves, by a tenure similar to that by which they held of the sovereign. Their possessions were also augmented by their usurpations, in the quality of counts, dukes and marquisses, of the crown lands contained within their respective jurisdictions; and having thus rendered themselves formidable to the crown, and at the same time benefactors to a numerous train of retainers, they became dangerous members of the state, and troublesome neighbours to the small allodial proprietors. Inequality of property, more especially in land, is particularly productive of mischief in a warlike and turbulent age; and the independent freeman, unable to protect himself in the enjoyment of his right, was generally happy, or at least compelled, to purchase safety by invoking the protection, and courting the service of his powerful neighbours. The domestic wars waged by unquiet and disobedient nobles, aggravated the evil, and forced those of inferior power and property to seek this feudal alliance; which, if it laid them under the obligations of vassalage, secured them, however, the benefits of protection. In a rude age, destitute of records, the nobles might easily assume the lordship of lands by usurpation. Hence was it, according to Montesquieu and others, that the feudatories of the king at least, had greater

privileges bestowed on them by the policy of the age, than even the allodial proprietors. This, combined with the other circumstances just mentioned, will sufficiently account for the general transition of allodial property into feudal. In addition to what has been said, it is supposed to have been a frequent practice with the less powerful freemen, to purchase the protection of the great lords by a stipulated payment of money; an engagement which received the name of 'Commendation;' and it may be fairly presumed that the stronger party was not slow, when circumstances favoured, to change this voluntary contract into a complete feudal dependence.

Hence, during the tenth and eleventh centuries, allodial lands in France had chiefly become feudal, being often surrendered by their owners, and received back on feudal conditions; or, more frequently, the allodial proprietor acknowledged himself, in a formal manner, the 'man' or vassal of a chief or *Suzerain*, and thereby confessed an original grant, which had never in fact been made. It was the same in Italy and in Germany, though not in the same degree; and even in France it were inaccurate to assert that the feudal system had an unlimited prevalence, allodial tenures always subsisting there as well as in the empire. Yet it is manifest how strong the inducements must have been, in these lawless times, to make the former prevail over the latter species of property, and lead the allodial proprietor to seek with anxiety to become a feudal tenant.

A great chieftain, possessed of large territory, and invested with ample military and civil jurisdiction as count or duke, lived at his country-seat, which the violence of his neighbours induced, and the weakness of the royal authority permitted him to fortify. He thus became clothed with a strong personal and territorial influence over a large body of vassals: these he industriously educated in military

exercises, lavished on them his hospitality, and conferred on them the only means of gratifying their ambition, or even of employing their leisure. The countenance of power would then, as it ever has, attach respect, as it ministered to their wants whilst it gratified their vanity; and the loose police of the times, if it weakened the bonds of the general government, knit more closely those smaller associations for defence and support. Hence, the government of the feudal kingdoms verged perpetually more and more towards aristocracy; and the barons and great lords acquired over their vassals that strong authority, and those feudal privileges, which were so far from belonging to them at the first settlement of the barbarians, that they themselves did not even exist as a body of nobility distinguished from the mass of *Franci* or freemen. Five centuries, in fact, elapsed before the allodial tenures, which had been by far the most general, gave way, and before the reciprocal contract of the feud attained its maturity.

Various writers refer to an edict of the emperor Conrad II. in the year 1037; as marking the full maturity of the feudal system; and we find that four principal regulations of that edict relate to as many important principles of feuds. The first principle to which I allude, as contained in that document, is, that no freeman should be deprived of his fief, whether held of the emperor or of a mesne lord, but by the laws of the empire, and the judgment of his peers. We need scarce mention that this provision was adopted in England, nearly two centuries afterwards, by the celebrated statute of Magna Charta. The second principle of the edict is, that from all such judgments a vassal holding *in capite* might appeal to his sovereign. In this provision we perceive the origin of the judicial powers formerly exercised by English sovereigns, and the source of that equitable jurisdiction which, in after times, was vested in the Lord Chancellor, as the king's vice-

gerent. Thirdly. In this edict we also find the principle that feuds should be inherited by sons, and their children; or, in their failure, by brothers, provided the feuds were paternal: and here we see the origin of that canon of English descents which restricts the inheritance of lands to the blood of the first purchaser or acquirer; and of the consequent exclusion of the half blood. Fourthly. The last rule to be found in this edict is, that the lord should not alienate the feud of his vassal but with his consent. In this regulation we perceive the source of the common law doctrine of forfeiture for unauthorized, and of fines for authorized alienations, the obligation of lord and vassal in respect to alienation, being reciprocal. So widely did the principle spread, of considering all property as subjected to feudal rights and obligations, that not only were lands bestowed as feuds, but even casual rents; as, for example, the profits of a toll, the fare paid at ferries, the salaries of offices, and even pensions, were given and held as fiefs, and military services exacted on account of them. Nay, the profits arising from masses said at the altar, though strictly an ecclesiastical due, were sometimes seized by the barons, and parcelled out among their sub-vassals. Even the clergy raised seigniories of the donations of land made to them by piety and faith, and exacted feudal service and fealty from their feudatories.

Hence we find in the 'Book of Feuds' a great variety of names of feuds, as, for example, the *Feudum de cavernâ*, the *Feudum de camerâ*, *Feudum soldatæ*, *Feudum habitationis*, *Feudum gardiæ*, *Feudum gastaldæ*, *Feudum mercedis*, &c. a brief explanation of each of which will be sufficient.

1. *Feudum de Cavenâ*, was the tenant's right to receive from the king's or lord's cellar (*cavena*) a certain supply of provisions. This feud came in lieu of those feasts which the king or lord, in more ancient times, gave

to their *comites*, or companions in arms. These feuds always terminated with the tenant's life, or with that of his lord.

2. *Feudum de camerâ* was a similar allowance of money out of the repository or *camera* where the king or lord kept his funds. In this, as well as in the preceding case, the tenant's right to draw the provisions or money, depended on there being unappropriated provisions in the *cavena*, or money in the *camera*; and these were granted either for past or future services. In both cases the feudists adopted the language of the civilians, and the former were denominated *inofficiosa*, the latter *officiosa*. Du Cange, Spelman, Craig and others have spoken of these feuds under the heads of *Camera* and *Cavena*.

To these *feuda inofficiosa* we may refer the pensions granted at this time by the king out of his revenue; and to the *feuda officiosa* we may refer the salaries of all officers, as judges, secretaries, state prosecutors, &c.

3. *Feudum soldatæ* was an inofficious or gratuitous feud, consisting of a piece of money (*solidus*) granted by the king or lord, either as a bounty, or for the tenant's past services.

4. *Feudum habitationis*. This consisted of the tenant's right to dwell in a house belonging to the lord, without the rendition of any rent or service, the same being held by fealty only.

5. *Feudum gardiæ*. This was an officious feud, and consisted of a pension granted to the tenant in consideration of his future defence of a castle. It differed from another species of feud, called *castle-guard*, in two respects, viz. that in this the castle or land was actually transferred to the tenant by livery of seisin, and that, by the strict feudal law, the castle could not be granted for a longer period than a year; whereas in the *feudum gardiæ*, the tenant had no estate whatever in the castle or land which he

was bound to defend. To this feud we may refer the salaries at present granted to the governors of garrisons.

6. *Feudum gastaldæ*. This was also a pension. It was granted by the lord to his tenant for performing the duties of receiver, steward or treasurer.

7. *Feudum mercedis*. This was an allowance made to the king's or lord's advocate; and to this we may refer the modern grants to lawyers *pro concilio impendendo*; or to the king's or queen's attorney or solicitor general.

These seven species of feuds are said to lie in grant, and not in livery, they being conveyed by improper investiture, of which I shall presently speak. They are, moreover, referrible to that class of property denominated incorporeal, as they consist of mere rights, and not of an estate in any visible and existing thing. Notwithstanding the great variety of feuds existing at the time of which we are speaking, allodial property long maintained its ground in some countries. In Languedoc, during the ninth, tenth, and great part of the eleventh century, property seems to have been entirely allodial: it was the same in Catalonia and Roussillon; and in the Low Countries this species of tenure continued, as we are informed by Robertson, during the eleventh, twelfth and thirteenth centuries.*

<p>Qualities and incidents of feuds. 1. Their general qualities, viz. Homage, Fealty, Investiture. 2. Their particular incidents, viz. Reliefs, Fines for Alienation, Escheat, Aids, Wardship, Marriage, &c.</p>	<p>DIVISION V. Having thus cursorily noted the progress of feudal tenures, and the general character of those circumstances which converted nations of independent proprietors into feudatories; free-men who claimed their possessions by right of their own swords, into vassals who held them by the tenure of obedience and fidelity to a superior; we may proceed to describe the legal qualities and effects of this feudal relation.</p>
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* 1 Rob. Charles V. 183. Montesquieu, book 31, chap. 3. 1 Hume, App. 2. Stewart's Disserta. 119.

The essence of the contract between lord and vassal was support on the one side, and fidelity on the other: the denial or neglect of the first involved the forfeiture of the seignior; of the second, that of the land. Of such strictness was this relation considered to be, that the vassal was bound to make war for his lord even against his own kindred, and, during the height of the feudal system, against the king himself.

The ceremonies used in conferring a fief, indicated the solemnity and strictness of this connexion. These were principally three, viz. HOMAGE, FEALTY and INVESTITURE. We shall give a brief explanation of these general qualities of feuds.

1. OF HOMAGE. The uncovered head, in the act of performing homage; the belt ungirt; the sword and spurs removed; the kneeling posture, and the placing of his hands betwixt those of his lord, in which circumstances he promised to become his man from thenceforward, to serve him with life and limb and worldly honour, faithfully and loyally; were strong and significant expressions of the submission and devotedness of the vassal towards his lord. The lord in person only could receive homage; the oath of fealty, on the contrary, might be received by proxy; and though it was indispensable, the ceremony was less solemn and peculiar than that of homage.

In doing homage, the tenant, whilst kneeling, said, 'I become your man from this day forward, for life, and for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you; saving the faith that I owe to our sovereign lord the king.' And the lord, whilst sitting, kissed the tenant.

The foregoing is called homage by tenure, to distinguish it from liege homage, performed by a sovereign prince to another sovereign, for lands held by the one of the other.

Liege homage includes fealty, and all the services consequent upon it. Homage was abolished in England by the statute 12 Charles II. ch. 24.

2. OF FEALTY. The obligations of fealty are also wholly of feudal origin, and are incident to every species of tenure, Frankalmoigne and Tenancy at Will excepted. Like homage, it is an oath taken by the tenant on his admittance, that he will be true to the lord of whom he holds the lands. No one performed homage but he who held the estate as an inheritance; whereas every tenant was bound by fealty, except those, as we have mentioned, who held either in frankalmoigne, or at the lord's will, in neither of which would the duties of fealty be at all consistent with the holding. The oath, which was taken by the tenant standing before his lord, and with his right hand on the book, was as follows. 'I, A B, will be to you, my lord C, true and faithful, and bear to you fealty and faith for the lands and tenements which I hold of you; and I will truly do and perform the customs and services that I ought to do to you.' Fealty continues to be incident to every tenure, as in former times, and was in no degree varied by the statute of Charles II. It is, however, but seldom, if ever, exacted at the present day. It may be enforced by distress.

3. OF INVESTITURE. Investiture was the actual conveyance of the lands &c. to be held as a fief, and was of two kinds, proper and improper; the first being an actual putting of the tenant into possession, by the lord, or his deputy, on the ground, known, in the English law, by the name of Livery of Seisin; the second being a symbolical delivery of the possession of the land, by handing to the tenant a turf, a stone, the key of a door, or any other symbol indicative of a transfer of ownership. The terms 'proper, and improper investiture' are constantly used in the feudal jurisprudence of the continent, and are

strictly synonymous with the English expressions, livery of seisin in deed, and livery in law.

Improper investiture was often a necessary substitute for the proper, as the latter, in those turbulent ages, was frequently attended with great inconvenience, and was sometimes impracticable. Both species were performed in the presence of the *pares curiæ*, or the freeholders of the county in which the lands lay. The person to be constituted tenant by improper investiture, humbly prayed the lord to grant him a certain estate; the lord then designated his grant by words or by deed, and accompanied this by the delivery of a ring, a sword, a staff, or by clothing him with a robe, which, being the most usual, gave to the ceremony the name of investiture. After investiture of either kind, the tenant did fealty, and sometimes homage. In the case of proper investiture, the tenant received the actual seisin. It was effected by going on the lands, and giving to the tenant, while there, a twig, a turf, a key, or hasp of the door, in the name of the whole. This ceremony being to be witnessed by the *pares curiæ*, that is, by the freeholders of the county, it could only be of lands situate in the county to which they belonged. Hence, where the lands lay in more than one county, the ceremony was to be performed in each, and before the *pares* of each. Improper investiture, though very usual, conferred only a right of action, and not a right of entry; and hence was it that, if the lord made *livery of seisin*, or proper investiture, to B, of lands which he had previously conveyed to A by improper investiture, B could not be compelled to yield up the land to A; but A had merely a right of action, to compel the lord to an *excambium*, (that is, to a recompense of a like estate) or damages, in case he had no lands wherewith to indemnify his tenant.

The duties of the vassal commenced after investiture and fealty, and these duties displayed a singular mixture of

the most submissive obedience, and of a high toned and generous loyalty. To divulge the lord's counsel; to conceal from him, and much more to assist in the machinations of others; to injure his person or fortune; or to violate the sanctity of his roof and family; were breaches of the fidelity which he had sworn, and some of them involved the forfeiture, or return of the lands, to the lord; as the lord, on his part, lost his seignior, who violated the daughter of a vassal entrusted to his custody or wardship.

But the feudatory was, above all, bound to military services to his seignior or lord: he was to adhere to his side in battle; to lend him his horse when dismounted; and to go into captivity as a hostage for him, should he be taken. This military service was uncertain, though generally settled by some usage. The tenant of a knight's fee (at least such was the case in England) was bound, if required, to be in the field forty days, and wholly at his own expense. This was extended by St. Louis to sixty, unless when there was an express reservation of a shorter service in the charter of infeudation. But the length of service diminished according to the quantity of land, and the owner of half or the eighth of a knight's fee, served respectively but twenty or five days; and the same apportionment was observed in case of a commutation of these military services for a pecuniary assessment called *Escuage*. Men over sixty years of age, public magistrates, and women were allowed to send substitutes to war. A failure in this primary duty involved, in strictness, forfeiture of the feud, which was, however, generally forgiven, and an amercement was inflicted, which the barons paid, not only for their own absence, but that of every knight and squire of their vassals. As to the place of service, the customs were much less certain and uniform; some compelling the

vassal to service in all places, and others limiting it to the boundaries of his lord's domain.

Having sufficiently explained these general qualities of fiefs, we are now to examine their incidents, or what have been usually called the fruits of tenure. These are the six following; *Reliefs*, *Fines for alienation*, *Escheats*, *Aids*, *Wardship* and *Marriage*. We shall bestow a brief examination on each.

1. OF RELIEFS. We have already mentioned that feuds or benefices, whether held of the crown or of its great vassals, were not originally inheritable, but were only grants for life. These, however, being usually renewed to the posterity of the antecedent possessors, from obvious motives, this constant, or, at least, common renewal grew from custom into a right. It was, nevertheless, natural that the heir should make some acknowledgment for this favour, whilst the lord, on the other hand, would not at any time require much at the hands of the heir, who appeared to have so fair a claim to what had been possessed by his ancestor, and probably had been much improved by him. This acknowledgment or gratuity would as naturally be turned by length of time into a right or due of the lord's, and thus the grants for life would become indefeasible inheritances, subject, on every death, to a charge on the heir. The sum or other thing thus paid or given by the heir to the lord of the fee, on succeeding to the inheritance, was denominated a relief, from *relevia* or *relevare*, because the estate was relieved from the lapsed state into which, by the theory of the feudal law, it had fallen. The person claiming to succeed, had originally no right; but he petitioned the lord for a new investiture, and tendered his relief and fealty. In process of time the petition and investiture were dispensed with, and the heir paid the relief, and succeeded in course to the estate of his ancestor.

The relief was originally paid in arms, and was at the lord's discretion in amount. This being found inconvenient, and often oppressive, tenants by degrees procured from their lords more favourable terms, and obtained from them, on their first investiture, a deed, or *brevium testatum*, which stipulated that the feud should descend to the tenant's sons, sometimes by name, at others, to them generally; and it also defined with sufficient certainty the kind and *quantum* of the relief to be exacted. On the grants to sons generally it was decided by the feudists, that grandsons were not embraced, as the fair presumption was that grandsons would not be able to discharge the feudal duties at the time of the death of a father without sons. This decision introduced other stipulations into the *brevia testata*; and in process of time the heirs generally, lineal and collateral female as well as male, were admitted to the feud on the payment of the required relief.

Some writers have preferred to impute the origin of reliefs to the rapacity of the lords, who taking advantage of minors, seizing their lands, and receiving these presents as a compromise, at last turned their injustice into a recognized and indisputable right. I confess that in regard to lands originally beneficiary, the first account seems far more natural; while the last is more probable as to such lands as were allodial, but surrendered, and granted back as feuds, and which being clearly inheritable from the beginning, offered no such reason to the lords as seems, with some justice, afforded by the first. I do not see, however, why we may not assume that reliefs may have arisen from both causes.

The relief and the other feudal incidents are said to have been established in France towards the close of the tenth century, and were equally known in England after the Norman invasion, about the latter part of the eleventh century. Reliefs were not abolished in England by the

celebrated statute 12 Charles II. but remain a legal demand to this day, in all cases of original soccage tenure, and of knight's service tenure, converted by that statute into common soccage, provided, in this last case, a quit rent or other rent had been reserved. Hence, at this day, all lands originally held by free and common soccage, pay a relief on the death of every tenant; and soccage lands also, which became so by the operation of the statute of Charles, are liable to the relief if any rent had ever been reserved. It is here proper to remark that *Primer Seisin* is not to be confounded with relief. The former differs from the latter in that it was payable by the king's tenants *in capite* in addition to the ordinary relief, in case the heir was of full age at the time of the descent. This was a compensation to the crown in lieu of wardship, which the crown would have had, had the heir been a minor. *Primer seisin* was abolished in England by the statute of Charles II.

2. OF FINES FOR ALIENATION. The feudal tenure was supposed to establish a connexion so intimate between the two contracting parties, as not to be dissolved by either without the other's consent. On the transfer of the lord's seignior, the tenant testified his concurrence by a ceremony called in England *Attornment*. The assent of the lord to the alienation of his vassal's land, was still more necessary. As the feud was presumed to have been bestowed for reasons peculiar to the vassal or his family; and as his heart and arm were bound to his superior, and his service was not to be exchanged for a stranger's, who might be unable to render it; the lord was entitled either to redeem the feud by paying the purchase money, or to claim a part of the value as a fine for its alienation. This was the case in France, and in other countries on the continent; but in England we find that even the practice of *subinfeudation*, which was more conformable to the genius of the feudal system than alienation, was at length re-

strained by the celebrated statute of '*Quia emptores terrarum*,' enacted in the eighteenth year of the first Edward.

As to the origin of fines for alienation, they no doubt sprung from the strictly reciprocal and feudal relation subsisting between lord and tenant. We know that when estates were no longer granted as *munera*, but as benefices for life, the lords were not content with the fealty, and the prospect of the tenant's future services, but demanded from their vassals, on investiture, an honorary fine. This being once established, there was no difficulty in the lord's successfully exacting a similar fine on every alienation of the feud; for in contemplation of law, there was a new investiture consequent on every change of tenant; and as it was a maxim that no feudal tenant could alienate unless with the license of his lord, this license would hardly be given without some present compensation; and this the tenant would more readily acquiesce in, as he, in turn, could exact a similar fine from his under-tenants. Hence the fine for alienation soon became an established fruit of tenure, and continued such in England until it was abolished, in the case of subjects, by the operation of the statute of '*Quia emptores terrarum*,' which enabled all persons freely to alienate their lands, provided the alienee held the land, not of the alienor, but of the alienor's superior lord, and by the same services by which the lands had been holden by the alienor himself. By this statute subinfeudation was abolished, and alienation introduced: fines for alienation, of course, could no longer be demanded, except those due to the crown on an alienation by the king's tenants *in capite*; for as the king had no superior lord, he and his tenants were not embraced by the statute of '*Quia emptores*.' But this perquisite of the crown was also abolished at the Restoration, by the statute of Charles II. so that fines for alienation are at this day whol-

ly unknown to English jurisprudence, though on the continent, and in some of the British provinces, they are still exacted.

3. OF ESCHEAT. Escheat was the reversion to the lord of such feuds as became vacant for want of legal heirs in the posterity or kindred of the first possessor, or feudal grantee. This falling of the feud to the lord who granted it, or to his heirs, was the natural consequence of feuds being granted to tenants in consideration of the performance of military or other services; for the vassal having left no heir, so that there was no one to perform these services, the lord who granted the feud was the only person having any just pretension to it. These reversions or escheats were a most important fruit of tenure, especially in England, where there was no power of devising them by will. They were still more frequent on account of the forfeitures occasioned by the delinquency of the vassal, which forfeitures were for a year, during the tenant's life, or forever, according to circumstances.

Under the rapacity of kings, absolute forfeitures soon came to prevail; and by the doctrine of the *corruption of blood*, the heir was effectually excluded from deducing his title through an attainted ancestor; and thus the estate would vest as absolutely in the lord, as if there had been an escheat *propter defectum sanguinis*, or, in other words, as if the tenant had actually left no posterity or relatives whatever.

4. OF AIDS. This fruit of tenure deserves some attention, as it was the seed from which sprang the taxation of modern times. These aids were sums of money which, under certain circumstances, the lord was entitled to demand of his vassal. Though they varied with local customs, or depended on the tyrannous caprice of the feudal lords, there were three kinds universally acknowledged, both on the continent and in England, and these were, 1,

to enable the lord suitably to marry and portion his eldest daughter; 2, to make his eldest son a knight; and 3, to redeem the lord's person from captivity. Aids of all kinds were oppressive, not only from the uncertainty of their amount, but from the circumstance that the lords sometimes demanded novel and unexpected aids, in order to meet their private exigencies; as to enable them to pay their debts, to discharge their reliefs to their superior lords, or to defray the expenses of some sudden military expedition, &c. These capricious exactions becoming at length an intolerable grievance, it was remedied in England by the statute of Magna Charta, the twelfth chapter of which provided that the king should take no aid without the consent of parliament, and that lords should demand no other aids than the three customary ones, viz. those acknowledged ones which I have just enumerated. The other evil to which I have alluded, was also remedied by the statute of Westminster 1, which defined the amount to be paid for making the lord's eldest son a knight, and for marrying his eldest daughter, and restricted it to twenty shillings for every knight's fee of land held by the tenant. The amount of the aid to ransom the lord's person was necessarily permitted to remain undefined. Besides these aids, there were several others known to the feudal jurisprudence, at least of the continent. In France an aid was demanded for the lord's expedition to the Holy Land, for marrying his sister or eldest son, and for paying a relief to his suzerain or chief lord. These aids became as oppressive on the continent as they had been found in England, and were from time to time variously modified by local customs, and baronial or other partial legislation. But in England they were wholly abolished by the statute 12 Charles II. and the necessities of the state have substituted in their stead a system of taxation which, though more certain, has been found in that country scarcely less burdensome.

5 and 6. OF WARDSHIP AND MARRIAGE. The intimate connexion between these two fruits of tenure renders it proper that we should consider them together.

If we advert to the relation between lord and vassal, we perceive at once that when estates became hereditary, the lord was as much interested in securing to himself the faithful discharge by a competent tenant of all the feudal duties, as the vassal was in having his hereditary rights fully recognized and preserved. The most effectual mode, then, of protecting the interest both of the lord and the heir, was to place the estate and person of the heir under the custody of the lord, until the heir came of proper age to take care of them both, and to perform in person all that the feudal bond required of him.

Wardship, then, was the lord's right to the care of a minor's person, and to the profits of his estate. Marriage was the lord's right of tendering to female wards a person in marriage, whom the ward could not reject without forfeiting to her lord as much as any one would give to him for the alliance. These general definitions are sufficiently accurate for our present purpose; but we shall find that the custody of the person did not uniformly follow that of the estate, and that male wards were also sometimes liable to the dictation of their lords as to whom they should marry. The rights of wardship and marriage obtained only in Germany, Normandy and England.

As lands in tenure were held either by knight's service or soccage service, so wardship (or guardianship, which means the same thing,) was of the same two kinds; for there were guardians and wards in chivalry, and guardians and wards in soccage. Where the lands were held by military service, the heir was in wardship until he attained the age of twenty-one years; and this was called wardship in chivalry. If, therefore, a tenant holding land by knight's service, died leaving his heir under that age, the

lord had the guardianship of his lands and person till he arrived at age, or until he died, and in the meantime the lord appropriated to his own use all the profits of the estate, being obliged, however, to maintain and educate the heir in a manner suitable to his rank and condition. The profits of the estate were allowed to the lord without any obligation on him to account, and this was conceded on the principle that the profits were only equivalents for the duties, or were as a compensation to the lord for his care in the maintenance and education of the ward, and also to enable the lord to answer to the king, or other superior lord, what might be due to them.

The custody of the heir's person was conferred on the lord because the law considered the solemn bond between him and his vassal a sufficient assurance of the ward's safety; and further, because the lord was not only the most competent to instruct him in the art of war, but was likewise greatly interested that he should be thoroughly instructed in it. But this custody of the minor's person was only in case the father was not living; for if a minor inherited lands during the lifetime of his father, which might easily occur, the father was guardian by nature, which superseded the personal guardianship in chivalry. Thus, for example, where A is grandfather by the mother's side, B is father, C is mother, and D is son; if A, holding lands by knight's service, dies, and C is dead, D shall inherit the land of his grandfather A, but the wardship shall be divided. The grandfather's lord shall take the lands in wardship, but B, the father, shall have the wardship of his son's person. Again; if a lord granted a military feud to the son of A, and this son died without issue, whereby the lands descended to his brother, a minor, the lord should have the custody of the land, and A, the father, would have the custody of the person. So, also, if the king had conferred knighthood on a minor, the guar-

dianship ceased both as to the person and the land. In England this principle of the feudal law was so strongly objected to by the lords, that parliament passed an act for the continuance of the wardship in lands notwithstanding the minor's subsequent knighthood.

When lands descended to a female ward, as she could never be called on for personal services, she was allowed to furnish a substitute when she obtained her majority; but whilst in wardship, the lord held her lands on the same terms as in male wardships, except that the wardship terminated at her age of fourteen, which in England was extended by act of parliament to sixteen, if the heiress remained unmarried till that time; and until twenty-one, and even longer, if she had rejected a suitable offer of marriage, made to her by her lord.

There is one circumstance very peculiar in the wardship both of knight's service and of soccage lands; I allude to the anomalous nature of the interest or estate in wardship. The feudal law, in all other cases, carefully distinguished the *jus proprietatis* in lands, (with the consequent right of reversion or escheat, together with the claim to services reserved to the lord, the whole of which were embraced by the word seignior) from the *jus possessionis*, with the permanency of the profits, which resided in the tenant. But in the case of wardship, all of these appear to have been blended, and the propriety and possession were united in the lord, and, apparently, the heir had no estate, or, at least, he had neither seignior, possession nor profits. Though the law restricted the duration of the lord's interest to the number of years which should intervene between the tenant's death and the heir's majority, yet it vested the fee in the minor heir *sub modo*, that is, in such a manner as gave him, as we have said, neither propriety, possession nor profits. Still the lord's estate was not a fee, a freehold, nor even a term for years; but it was a species of chattel in-

terest *sui generis*. The lord could alienate without livery of seisin, and without license, and on his death, during the heir's minority, the lands descended to the lord's executors, and not to his heir. Hence, the estate in chivalry, both as to the lord and heir, was entirely anomalous, there being features in it which appertain to no other estate known to the law.

By the charter of Henry I. of England, wardship (which had grown to be the most oppressive of all the feudal incidents) was relinquished by the crown, and the heirs of crown vassals were during their minority restored in a great degree to that allodial property in their lands which had so generally obtained in the early history of the feudal ages. As the crown had not the lands in wardship, and as the minor was under no obligation to serve his lord either in person or by substitute, the king, by relinquishing wardship, restored the lands to the state of pure *allodium*, during the heir's minority. This state of things continued, however, for a very short period; for in the reign of king John, wardship *in capite* had become so firmly reestablished that the crown vassals only aimed at procuring some regulations to mitigate the hardships of this most vexatious of the royal prerogatives. We may form some idea of the great value of this fruit of tenure in that country, when we are informed that Henry III. granted the wardship of Gilbert de Umfreville to Simon de Mountford for 10,000 marks; a sum equivalent at this time to perhaps £200,000. We have stated that the lord had the custody both of the person and lands of his ward in chivalry: but this was the case only in England; for in France and Germany the land was committed to the care of the minor's next heir, and his person to that of the nearest of blood who could not inherit the lands; as we shall presently see was the case in England, both as to the land and person, in case of soccage tenures.

Having dwelt sufficiently on wardship in chivalry, we proceed to inquire briefly into the nature and history of Wardship in Soccage.

We have seen that wardship in chivalry was the lineal offspring of the feudal relation. Public policy demanded that the ward should receive a military education, and that his estate and person should be placed in the charge of that lord whom he might be called to serve and defend. These considerations, however, did not obtain in the case of the descent of soccage lands to minor heirs; for on the descent of such lands, the lord was only interested in knowing that the estate was preserved from waste or decay. We consequently find that in England the lord had the wardship neither of soccage lands nor of the person, but that the charge of both was given to the minor's next of kin, who by no possibility could inherit the estate. Thus, for example, if soccage lands descended to A *ex parte maternâ*, none of his maternal relatives would be entitled to the guardianship of the land or person, but the wardship would vest in the next of blood *ex parte paternâ*.

The following are some of the leading doctrines of the English law as to this species of wardship; and they will generally be found to originate in feudal principles.

1. Soccage guardianship or wardship sprung wholly from tenure; and yet it is now said to embrace hereditaments which do not lie in tenure, and even copyhold lands and personal estate. Of this opinion is Mr Hargrave, the learned annotator on Lord Coke's 1st Institutes,* contrary to that advanced by Chief Justice Vaughan.†

2. Soccage wardship takes place only on a descent. It was at all times conceded that wardship in chivalry was consequent only on a descent of lands, and never on a purchase; but it had been supposed by some that if a

* Coke upon Littleton, 91 b. note 9, 116. a.

† Vaughan's Reports, 186.

minor should acquire soccage lands in any other way than by descent, he would be in wardship. This doubt was not settled to the contrary till the 29th of Charles II.*

3. As soccage wardship belongs to the next of kin (without distinction as to whole or half blood) who can by no possibility inherit the lands; if there should happen to be two or more persons in equal degree, and of course equally entitled, he who first gains the minor's person, shall have the wardship of his lands also; the maxim in this case being, "*melior est conditio possidentis.*"

4. But if the conflicting claimants in such a case be the minor's lineal ancestors, and the heir's person has not been gained, the law prefers the father, or other male ancestor; and if they be his collateral relatives, the eldest brother or sister is preferred.

5. If, however, the minor inherits lands both *ex parte paternâ et maternâ*, it being then very probable that none of his kin can be found who would be incapable of inheriting, the law permits the custody of the person to remain with him who first gains it; and the wardship of the paternal lands vests in the next of kin *ex parte maternâ*, and so, *vice versâ*, as to those descending from the maternal line.

6. Should the minor so inherit the lands as to let in the paternal and maternal heirs successively, preferring, however, the former to the latter, (which would be the case where lands are inherited from a brother who had purchased the estate) it has never yet been judicially settled in such a case, who would be entitled. Here, as there is no next of kin who cannot inherit to the minor, we presume the next male heir *ex parte paternâ* would have the better claim; unless the principle of gaining the infant's person should be allowed in this, as in some other cases.

* 2 Modern Reports, 176.

7. Soccage wardship is not assignable, forfeitable or inheritable, as guardianship in chivalry was; for the former is a personal trust for the infant's benefit, whereas the latter was always regarded as a valuable estate, mainly for the lord's benefit. In case, therefore, of the death or incapacity of a soccage guardian, the wardship devolves on others, according to the rules which have already been stated.*

8. A guardian in soccage is a mere trustee, who is held to a strict account to his ward when he arrives at age; whereas the guardian in chivalry received all the profits of the estate, after suitably educating and maintaining his ward.

9. Soccage wardship terminates when the heir attains the age of fourteen, at which time he may enter into the lands, or appoint a new guardian, or continue the old one. It has been contended by some authors, that this guardianship does not determine till the age of twenty-one, unless there be another guardian ready to succeed, elected by the minor, or chosen by the father under the power of appointing a testamentary or other guardian, conferred by the statute 12 Charles II.† At all events, if no testamentary guardian be appointed, the court of Chancery will, on application, appoint a guardian over the person and property until the heir attains the age of twenty-one.

10. If after the age of fourteen the minor does not enter, and no guardian is chosen by him or his father, but his former guardian continues in possession, receiving the profits, it was at one time a question of considerable doubt, how the minor is to compel the guardian to respond for receipts after the age of fourteen, seeing that the guardianship had legally determined at that period. It was conceded that the action of account would not lie against him

* Vaughan's Reports, 181. Plowden's Reports, 293.

† Andrew's Reports, 313.

as guardian. It was also admitted that *laches* or neglect should not be imputed to the infant, who, though of an age in which he was competent, not only to appoint a new guardian, but also to contract marriage, yet would be presumed by the law unacquainted with matters of account, and other legal rights. In order, therefore, fully to protect the minor in such case, the law resorted to a reasonable fiction, and supposed that after the age of fourteen he had appointed his former guardian his bailiff or receiver; and therefore gave to the infant an action of account against him, not indeed as guardian, but as his receiver.

11. If the guardian in soccage neglects the estate, and a stranger enters on the lands, and receives the profits, it has been held that such person shall not be regarded as a wrongdoer, or, as the law would call him, an abator, which would have been the case had the heir been of full age. But, on the contrary, the law will presume that the stranger's act proceeded from kindness, and in order to remedy the neglect of the guardian. By this fiction, moreover, the stranger is supposed to be a guardian, and the heir, after he has attained the age of fourteen, may charge him as such in an action of account, and recover all the profits received by the stranger.

12. In the last place, a guardian in soccage is liable to the strictest account to his ward; not only of all the profits actually received, but of those which he ought to have received. This was strongly illustrated in the case of the *valor maritagii*, which, if received by the guardian, was to be accounted for; and if none were received, he was personally responsible for what he might have received.

The next feudal incident on which we have to remark, is that of MARRIAGE. We have already stated that *Mari-tagium* was anciently the lord's right to tender a husband to his female ward, holding lands by the tenure of knight's service, and also of disposing of her in marriage, in consi-

deration of such a sum of money, or any thing else, as he could obtain from the intended husband or his relatives. This became a very profitable fruit of tenure, and a very oppressive one to the tenant.

After feuds had become descendible to females, the same necessity which forbade vassals from alienating without the lord's consent, (*viz.* to prevent the introduction into the feudal society over which the lord presided, of any person who might be hostile to his interests,) also rendered it essential that his female tenants should not introduce such persons by their indiscreet or unsuitable marriages. But this motive, so important in those perilous times, soon gave way to others of a very different kind. The female wards were in fact exposed to the highest bidder. In many cases, the lord being unwilling to yield up the land as early as his ward's age of fourteen, declined making any offer of marriage, or placed so high a price on her as excluded the possibility of her marrying. At first, also, this right of marriage was confined to female heirs; but in the reign of the third Henry, the lords, by a forced construction of *Magna Charta*, which enacted that 'heirs should be married without disparagement,' contended that this word 'heirs' embraced males as well as females; whereas it is manifest the statute intended to soften the former law, which related only to females, and merely to enact that such wards, when given in marriage by their lords, should not be disparaged; and by no means to confer a new right, or to embrace those who had never before been subjected to this feudal restriction; especially when we know that the lord's right to interfere in the marriage of his female tenants, was originally introduced for no other purpose than to secure him against husbands selected by his female wards from hostile clans.

Numerous laws were made from time to time to correct the cruel abuses of this privilege. Marrying without the

lord's consent induced, at one period, an absolute forfeiture of the ward's estate to the lord. But by the statute of Merton, the penalty was fixed at double the value of the marriage, to be received out of the profits of her land, which, for that purpose, might be retained after her age of twenty-one, and until paid. By the same statute it is also provided, that if the lord should have his ward married to her disparagement, she being at the time under fourteen, he should forfeit his wardship; and that if the ward should merely refuse a suitable offer, but did not subsequently marry against her lord's consent, she should then forfeit only the single value of the marriage.* I am not disposed to pursue this obsolete subject any further, especially as marriage and wardship were wholly abolished in England by the statute 12 Charles II. by reason of the conversion of knight's service into free and common soccage.

Causes of the rise of the Landed Aristocracy, and of the orders and ranks of Citizens. Privileges exercised by lords within their fiefs—viz. Coinage of money, Private war, Taxation, Legislation, and Judicial jurisdiction.

DIVISION VI. Before I proceed to the main object of the present division of my subject, which is to inquire into the sovereign privileges claimed and exercised by the great feudal lords within their respective fiefs, I shall endeavour to trace the rise and progress of the feudal aristocracy, and of that distinction between the high and low born which affected, not only the personal respect, but the legal and constitutional rights of both.

This distinction was certainly unknown to the Franks, among whom every man was a soldier, and every soldier a

* By the word 'disparagement,' used by the statutes of Magna Charta and of Merton, is meant an unsuitable alliance, which Lord Coke, with his usual quaint and methodical minuteness, divides into four classes. This disparagement, for which the heir may refuse to marry the person tendered to her, may be, according to the learned author;

1. *Propter vitium animi*; as where he is an idiot or lunatic.
2. *Propter vitium sanguinis*; as if the husband offered be a villain; the

freeman; and who were all, not only independent proprietors, but electors of the chief or king under whom they went forth to conquest; a state of civil and political rights extremely different from the constitution of a feudal state, whose various ranks, together with their respective privileges, we shall hastily notice.

The feudal aristocracy doubtless owed its commencement to individual wealth, and this was generally the lot of the beneficiaries of the crown, who partaking not only of the royal bounty, but of the royal counsels, and the dignities of the state; gradually rendering their fiefs hereditary; and but seldom alienating, nay even prohibited to alienate, their estates; were thus kept conspicuous in the public eye, and added, every generation, to their importance. Territorial wealth, also, is the best suited to impart influence to its possessors. The counts and dukes, usurping their dignities as hereditaments, were at the head of these dignitaries, and often assumed titles from their counties or duchies: In this they were imitated by the inferior barons, who took their names of distinction from some town or castle. The feudatories too, whether small or large, were all soldiers, the source of no little respect in a turbulent age; and thus it was that the mixed considerations of birth, tenure, occupation and wealth gave durable respect and power to particular families.

This was ascertained and strengthened yet more by the adoption of surnames, and of armorial bearings, which probably took place, the first in the eleventh century, when the nobility began to add the names of their estates

child of a person attainted of treason or felony; a bastard; an alien, or the child of an alien! a haberdasher! &c.

3. *Propter vitium corporis*, as monsters; deformed or diseased persons; squinters! persons blind, deaf or dumb, consumptive, palsied or impotent.

4. *Propter jacturam privilegii*; as where the individual offered had been once married. Finally, the offer must be *competens maritagium absque disparagatone*.

to their own, and to transmit to their posterity any fortuitous appellation they might acquire; the second, by private families at least, about the commencement of the thirteenth century.

The origin of armorial bearings is variously explained. Emblems somewhat similar had been very generally used; but the introduction of these bearings has been attributed, sometimes to the tournaments, wherein champions were distinguished by some striking device; sometimes to the crusades, where the mixed multitude of the armies required distinctive tokens; and, lastly, by Villaret they have been attributed to the separation of the same family by settlements in Palestine, which rendered these bearings necessary for the preservation of the family connexion. The loftiness of birth being thus rendered more clearly traceable, the high born and the ignoble were effectually distinguished. On the former were conferred all offices of trust and power, except legal offices. Originally, a plebeian could not possess a fief; though in France the land itself carried an ennobling quality, at least after being possessed for three generations. Gentlemen never exercised any trade; children, in order to inherit any territory held immediately of the empire, must have been born of noble parents on both sides; and though in France gentlemen were held noble for the purpose of inheritance, and exemption from tribute, they could be received into no order of chivalry. All baronies were originally by tenure of land; but the kings of France, before the close of the thirteenth century, assumed the privilege of creating nobles without regard to tenure of land; an innovation of great influence in diminishing the power of the territorial aristocracy, and strengthening that of the throne.

Thus, then, all those who in France held lands immediately of the crown, whatever title, (as duke or count, for instance,) they might bear, were comprised in the or-

der of barons. These were originally the *Pares* or peers of the king's courts; they had the right of carrying their own banner in the field, and possessed the higher as well as the lower territorial jurisdiction. To these correspond the *Vavassores Majores*, and *Capitanei* of the Empire. Subordinate to them were the vassals of this high nobility, termed *Vavassors* on the continent, and known sometimes, though rarely, by that name in England. The *Chatelains* were also Vavassors; but having fortified houses, and ampler rights of territorial justice, they were somewhat higher in the scale of tenure. When the personal nobility of chivalry obtained, the vavassors who obtained knighthood were called *Bachelors*; such as had not that honour, *Squires*. The *Prelates* and *Abbots* were also included in the ranks of the feudal nobility: they swore fealty to the king or lord, received homage of their own vassals, and exercised the same authority and jurisdiction as the lay lords; and, though not originally obliged to military services, they partook of the martial spirit of the times. To avoid, however, this military service, or the pecuniary commutation of it, the prelates introduced the tenure of frankalmoigne, which includes no obligation but that of saying mass for the benefit of the family of the grantor of the feud.

The classes below the gentry were distinguished into *Freemen* and *Villains*: of the first were the inhabitants of chartered towns, called *Citizens* and *Burghers*; the *Socagers*, whose tenure was free, though not noble; and lastly, the tenants for life, called *Freeholders*, from whom sprang the yeomanry of England. On the continent, the mere freemen were not so distinguishable, because, from their slight estimation, they were often confounded with the villains; yet it is evident they existed there.

The second class, viz. the villains, though all alike obliged to remain on their lord's estate; though precluded

from selling the lands on which they lived; and though the lord might at any time reclaim their persons; still differed in their actual conditions. One kind, called *Serfs* in France and Germany, could neither acquire nor inherit property, and were themselves liable to be conveyed to strangers, apart from the land. These, in England, were called *villains in gross*. Their services were not only indeterminate, but ignoble; such as the felling of timber, the carrying of manure, the repairing of roads, &c. The others, who were merely *villains*, were bound only to fixed duties and payments, generally of the same description; but according to the opinion of some writers, their estates escheated, on death, to their lord. The children, in both these degrees of servitude, followed the condition of the mother, except in England, where they followed the father's, the well known rule, *partus sequitur ventrem*, having been rejected in that country. Such were the respective personal privileges of the gentry and of the low born; and it is comprehensible enough how, when great wealth and high dignities were superadded to those of the great barons, they acquired, especially in France, that large territorial influence which in fact converted them into so many petty princes.

Having dwelt sufficiently on the rise of the feudal aristocracy, and of the various ranks in society, I shall, as before promised, examine the more important of those privileges which the lords or great feudatories exercised within their fiefs. These may be classed under the five following heads; Coining money; Private War; levying Taxes; Legislation; and Judicial Jurisdiction. How extremely independent these feudatories were of the crown, will appear from a short examination of these sovereign powers.

1. They possessed, and of course abused, the important prerogative right of coining money. This right, however, was always very reluctantly accorded to them by the

crown; for we find that by a capitulary, even as early as Charlemagne, the circulation of any money which had not been stamped at the royal mint, was expressly forbidden. About the beginning of the tenth century, the barons issued money with no other mark or stamp than their own. But Louis IX. politically enacted that the royal money should circulate within the domains of the barons, concurrently with their own; and Philip the Fair established officers of inspection in every private mint. No subject in England ever enjoyed or claimed the right to coin money without the royal stamp and superintendence, though they sometimes usurped the privilege in fact.

2. The right of waging private war is the next privilege which claims our attention. This customary right arose out of the manners of the ancient Germans, among whom revenge of injuries was a private and personal right. After their settlement in the provinces of the Empire, the causes of quarrels multiplied; and their fury and extent augmented proportionably with the progress of the beneficiary estates, which placed the vassals under the same obligation of revenging the wrongs of their lords, as once had been confined to their kindred. Such was the weakness, too, of the royal authority, and of the law, that the feudal nobles might in truth be regarded as so many persons in a state of nature. Conformable to this idea was the restriction of the right of private war to the noble or gentle of birth; for the disputes of slaves, villains, inhabitants of towns, and freemen of inferior condition, were to be decided only in courts of justice: nay, even the disputes of gentlemen with the base born were to be thus decided, and not by personal combat. The dignified ecclesiastics, however, claimed this right, but exercised it by their advocates or *vidames*, persons of rank and reputation who espoused their cause, and fought their battles. It was even the care of the laws to determine to what degrees of kin-

dred the right extended, and to enforce the kindred to take part; and the right of private war, and the obligation of uniting in it, were ascertained by the same degrees of affinity and consanguinity within which the church prohibited the *marriage* of persons.

Nothing could be more calamitous than the consequences unavoidably flowing from this barbarous privilege. Being nourished by feudal obligations arising out of the tenure of lands, we even at this day speak of *feuds* as synonymous with *deadly quarrels*: the land and its tenure giving name to one of the best established, but most fatal of the privileges we are considering. What methods were taken to lessen, and finally to abolish this right, so fatal to morals and the peace of society, will be seen hereafter.

3. The next privilege was that of levying taxes. The kings of France, in regard to taxation, stood on no higher grounds than their own nobles. Aids, reliefs, the rights of toll, of customs, alienage, (*aubaine*) even the enjoyment of the temporalities of ecclesiastical benefices, were possessed by them alike: The king himself was merely a great feudatory; and if he exacted money, particularly from the inhabitants of towns, the barons and suzerains did the same in their own fiefs. The system of taxation, properly so called, was a modern invention, the joint offspring of rapacity and necessity.

4. We are now to speak of a most important privilege of the feudal lords, viz. that of legislation. One of the most striking features in the feudal policy of France, was the absence of nearly all supreme legislation. After the firm establishment of fiefs and their incidents, this was truly the case in that country, during the period of nearly three hundred years. The barons were the legislators of their baronies; and though there were assemblies of the nation, called the parliaments of the *Champ de Mars*, from their being held in the month of March, and in

which it is probable that every allodial proprietor had a right to vote, yet these national assemblies ceased to be held about seventy years after the death of Charlemagne. The latest capitularies made in these assemblies, are those of Carloman, in the year 882. Thenceforth the feudal lords were the legislators, as well as the judges of their dominions; and though it is not uncommon to find ordinances for the regulation of large districts comprising many baronies, these were in fact compacts of several independent powers, entered into for mutual convenience, and not emanations from any general depository of the legislative power.

5. Connected with the privilege of legislation, is that of judicial jurisdiction, which came to be exercised to a great extent by the barons within their respective fiefs. Among the Franks, Lombards and Saxons there seems to have been pretty much the same modification of the judicial authority. Every ten families had a magistrate, elected by themselves, to decide on their rights and their disputes. This was the *Decanus* of France and of Lombardy, and the Tithingman of England. Next was the *Centenarius* or Hundredary, chosen by a hundred families, and of superior authority. The jurisdiction of these petty magistrates was generally restricted to less important matters; for in the weightier ones, or in appeals from the lower jurisdictions, the Count was the judge. He was appointed by the sovereign, but he was both assisted and checked in his administration of justice, by assessors called *Scabini*, who held their office by election, or, at least, by the consent of the people, and formed a kind of jury, though resembling more closely the *judices selecti* who sat with the Roman Prætor. An ultimate appeal lay to the Count Palatine, an officer of the royal household; and causes were sometimes decided by the sovereign himself. Charlemagne, to prevent abuse and mal-administration, appointed *Missi Re-*

gii, judges in eyre, who held assizes from place to place. What is here said as to the judicial arrangements in France, applies in some degree to England and the Empire, in which countries inferior jurisdictions of a similar character obtained.

This original model of judicature was gradually supplanted by the territorial jurisdiction of the barons. We early find inserted in grants of land, an immunity from the jurisdiction of the royal judges, and that of the feudatories must naturally have taken its place. The allodial tenants were exempted of course from all but the king's jurisdiction; but when sub-infeudation became almost universal, the territorial jurisdiction must have become proportionably so. Even the count himself, becoming the suzerain rather than the governor of his district, altered his tribunal to the feudal model. Those of the sovereign, forgotten like his laws, gave place to manorial courts, in which the rules of evidence were superseded by the judicial combat, or by some other appeal to what was called the judgment of God; and the laws were reduced to customs, as various as the numerous baronies.*

* The great number of territorial jurisdictions which obtained, not only in France, but in the Netherlands, Germany &c. necessarily originated a great diversity of legislation, customs, and judicial procedure. Frequent collisions arose from this diversity, and caused the occurrence of questions of extreme interest respecting jurisdiction. A marriage, for example, valid in one place, might be void in another; a divorce granted by one tribunal, might not be respected in a second; a will executed in conformity to one system of laws, might not correspond with the requisitions of another; a contract might be affected by the law either of the place where it was made, or that in which it was litigated, or that in which it was designed to be executed, or that in which the subject of the contract was situate, or, finally, that of the domicile of one or both of the contracting parties: and so as to the remedy, and various pleas, which might be resorted to in one tribunal, and not in another. These are questions of intrinsic difficulty, on which the Continental jurists have displayed surprising ingenuity and learning, unhappily little known to English and American lawyers. The vast vari-

I forbear to discuss the various degrees in which this right of judicature was enjoyed by the owners of fiefs, and which, in France, were divided into the *high*, the *middle*, and the *low* jurisdictions; and shall conclude this subject by remarking that it was rendered by one circumstance less tyrannical in its operation than at first view might be supposed: this was, that it was generally exercised by deputy. The counts, while yet officers of the crown, had their *viscounts*; the ecclesiastical lords, prohibited by the canons from inflicting capital punishment, and ignorant, it was presumed, of the laws of civil rights, had their *advocates* or *vidames*; and the lay lords had their *vicarii*, *bailiffs*, *provosts* and *sub-seneschals*. Indeed, in later times, it became a max-

ety of baronial and provincial customs, laws and tribunals in France, rendered these conflicts especially frequent in that country. It gave rise to a body of learning, and of refined distinctions as to the extra-territorial operation of statutes, which the lawyers of this country are particularly called on to examine, since American jurisprudence, arising, as it does, from the laws and customs of twenty-five independent sovereignties, is not likely ever to become a very homogeneous system, and must necessarily give rise to a series of questions very similar to those occasioned by the various systems of laws existing in continental Europe. I am happy to say that this subject has been recently taken up by an eminent American civilian, Mr Livermore, a gentleman very favourably known to the profession, and who cannot fail by such a work to increase the obligations he has already conferred on it. The first number only of his work has yet appeared. It is designed to be a thorough investigation of this intricate and delicate subject, a *terra incognita* to most of the lawyers of our country, and particularly to those who have not extended their researches into the mixed Roman law of the continent. This number is devoted principally to the statement of the questions; some account of the numerous authors who have treated of them, and their various theories on the subject; the criterions by which we may correctly distinguish between *real* and *personal* statutes, and their effects; the supposed foundations on which statutes have sometimes an extra-territorial operation; the recognition of foreign laws and decisions under the doctrine of national comity; and some remarks on adjudicated cases on these subjects in American courts, principally in Louisiana. These topics are discussed with much research, and great clearness, and give assurance of the

im that the lord could not sit personally in judgment, and that the lord's vassals, who were peers of his court, must assist in all proceedings; and where there were not two vassals, there was no court, because there were no peers.

Such were the privileges of the landed aristocracy of the feudal nations; privileges which constituted every baron of note an independent chieftain, invested in fact with the powers of sovereignty.

We have now considered the origin and progress of feuds, their nature and incidents, and the power which they threw into so many hands. We forbear to insist on the strange anarchy which the very symmetry of the system produced; or to enter into details of the state of Europe during more than three centuries.

satisfactory execution of the remainder of the work. The treatise will be among the most valuable known on the subject, perhaps, in any country. The student may hereafter consult, at his leisure, Troullier's *Droit Civil*, tom. 10, 117. Voet *De Statutis*. Hertius *De collisione legum*. Emerigon des Ass. tom. 1. c. 4, sec. 4. Huberus, 2 vol. lib. 1, tit. 3. Rodenberg *De jure quod oritur ex statutorum diversitate*, tit. 1, cap. 1, and the following English and American authorities. Sill v. Warwick, 1 Henry Blackstone's Reports, 690. Robinson v. Bland, 2 Burrow's Reports, 1077. Solomon's v. Rice, 1 Henry Blackstone's Reports, 131. Hunter v. Potts, 4 Term Reports, 182. Phillips v. Hunter, 2 Hen. Black. 402. Melan v. Fitzjames, 1 Bosanquet & Puller's Reports, 138. Selkrig v. Davis, 2 Dow's Reports, 230. Dalrymple v. Dalrymple, 2 Haggard's Reports, 54. Pippon v. Pippon, Ambler's Reports, 25. Bruce v. Bruce, 2 Bos. & Pull. 229 *in notis*. Norris v. Munford, 4 Martin's Louisiana Reports, 20. Ranway v. Stevenson, 5 Martin, 23. Saul v. His Creditors, 5 Martin, 569. Fisk v. Chandler, 7 Martin, 24. Thuret v. Jenkins, 7 Martin, 318. Bird and others v. Casital, 2 Johnson's N. York Reports, 344. Holmes v. Remsen, 4 Johnson's Chancery Cases, 460. 20 John. Rep. 229. Milne v. Moreton, 6 Binney's Pennsylvania Rep. 353. Harrison v. Sterry, 5 Cranch's Rep. Sup. Court U. S. 289. Harvey v. Richards, 403. Slocum v. Pomeroy, 6 Cranch, 221. Scofield v. Day, 20 Johnson, 102. Goodwin v. Jones, 3 Massachusetts Rep. 577. Grimshaw v. Bender, 6 Mass. Rep. 157. Dyk v. Kane, 1 Gallison's Rep. 371, McCandlish v. Cruger, 2 Bay's S. Car. Rep. 377. Taylor v. Gear, Kirby's Conn. Rep. 313. Lodge v. Phelps, 1 John. Cases, 139. McNeil v. Colquhoun, 2 Hayward's N. Car. Rep. 24.

A very important inquiry yet remains to us, namely, by what gradation of changes the feudal monarchies assumed their present structure, and how this unique system of policy suffered a decline equally inevitable from its nature, conformable to the ambition and rapacity of monarchs, and necessary from the advancing civilization of men. We therefore proceed to inquire into the topics of the next division of our subject.

Progression of the feudal system towards its modern form and aspect. **DIVISION VII.** We may consider this extensive subject under three important divisions; 1. the original extent, and progressive enlargement of the royal authority; 2. the constitution of the national councils, and the mutations of their authority; and 3. the extension and eventual predominance of the royal judicial jurisdiction over the baronial and territorial; a most interesting chain of subjects, to which our limits are far from permitting us to do justice.

(1.) Of the original extent, and progressive enlargement of the royal authority. Under the first race of the French monarchs, the kings were elected by the people; and though, under the second, the choice was confined to a particular family, the people's consent seems to have been necessary to the selection of any one of that family. By degrees, however, this selection came to be supposed or neglected, and the descendants of Hugh Capet, the founder of the third race, succeeded by hereditary right to whatever share of authority they were permitted to wield over their turbulent aristocracy. Depending almost wholly, however, for revenue on their own domains, and commanding no forces but the feudal militia, the right by which they held the throne was of but little moment, since the authority it bestowed was so limited and disputed. Events, however, perpetually augmented their power. The accession of the Capets added large fiefs to the royal possessions. Under Charles VII. the possessions of the English in France

were wrested from them, and added to the French monarchy. The very struggle to regain these subserved the policy of the kings, who under a pretence, very just in truth, of the inefficiency of the feudal soldiery for ready defence, introduced troops of mercenaries, and eventually standing armies. The wealth of the nobility was impaired in these wars; their fiefs fell to female heirs, and became divided, or they escheated for the want of heirs. Louis XI. almost completed the ruin of the aristocracy by disgracing them; by raising obscure persons to dignity and the royal counsels; by tampering with the national assemblies, and, finally, by the acquisition to the throne of foreign dominions, viz. of Burgundy, Provence, Artois and Roussillon. Similar causes gave stability to the monarchy of Spain, although, from particular causes, it was later in obtaining it. The revolutions of the imperial authority in Germany, though ascribable to the same general causes, will be better understood when we come, in considering the changes in the legislative power, to view the structure of the Germanic body; and so in regard to England. In all these countries, the preponderance of the royal authority grew more out of the personal policy and resources of the kings, and the encroachments which, in consequence of them, they were encouraged to make, than out of the consent of their subjects, or their sense of their propriety or necessity; and the consideration of the two succeeding topics will exhibit the character and success of this royal policy.

(2.) Of the constitution of the national councils, and the mutations of the legislative power.

The government of the barbarians was not an arbitrary rule, but proceeded on the principle of a free and equal voice in all deliberations for the common good. We have mentioned the parliaments of the *Champ de Mars*. Two assemblies were held annually. In the first all laws for the public benefit were enacted, the more considerable persons of both the laity and clergy deliberating,

and the inferior adding their consent, and sometimes venturing to discuss. To the second assembly the chief men only, and officers of state were admitted; their province was to consult on the more urgent affairs of government, which might concern perhaps the execution of the laws, or foreign policy.

In a capitulary of Louis the Debonair, containing the instructions given to each count to bring to these assemblies twelve *Scabini*, we trace the first germ of *Representation*; and it is unquestionable that the theoretical consent of the people was necessary to legislation during the reign of Charlemagne and his first successors. When France came to be divided into great and independent fiefs, we hear nothing of these national assemblies. While every baron legislated for his domain, the king had a royal council composed of tenants in chief, of prelates, and household officers. Sometimes, indeed, the kings appear to have acted with the consent of an assembly more numerous, and particularly summoned; as, for example, on the undertaking of the crusade of Louis VII. and the imposition of the Saladin tithe. As to the great meetings of the barons at their grand festivals, they seem to have been affairs of pageantry, and were seldom, if ever, convened for any purpose of business.

Thus, there appears a great difference between the French and English monarchies, even while the latter was under the arbitrary rule of the Normans; for in England there was always a parliament of the great lords and large proprietors. Yet the government of the Norman sovereigns was the stronger of the two; and the very circumstance of the unfrequent attendance of the French peers on the king's council, proves the disorganization of the monarchy. They denied the coercive authority of that council; every baron, they held, was sovereign within his fief; and the king could not, according to the 'Establishments

of St. Louis,' declare any new law within the territory of a baron, or the baron in that of his vavassor. Thus, the kings of France could hardly be regarded as sovereigns beyond their peculiar domains. When circumstances, indeed, showed the necessity of enactments having force beyond the bounds of a single fief, congresses were sometimes held of the neighbouring lords, wherein resolutions were agreed to, which each was to execute within his own fief; and the ecclesiastical councils sometimes assumed the right of a more general legislation; as, for example, that of Troyes, which, composed in part of laymen, laid a fine on invasions of church property; and also that of Toulouse, prohibiting the erection of fortresses, and the making of new leagues, and ordaining that judges should administer justice gratuitously.

Thus, then, we observe two distinct epochs in the history of legislative authority in France. In the first is to be found a free, and in some degree a representative legislative body; in the second, a division of that power, together with almost all others essential to sovereignty, amongst the aristocratic feudal proprietors.

But as such a state of misrule could scarcely endure long, so the attempts of the kings were not slow nor late to assume this essential prerogative into their own hands. In the year 1223 we find an attempt by Louis VIII. under cloak of a consent of the barons; yet in 1269, the date of the 'Establishments of St. Louis,' no mention is made of the consent of the barons, and perhaps it occurs in no subsequent royal ordinance. In the ensuing reign of Philip the Bold, kingly prerogative had so far gathered strength, that one of their jurists declares that when the king makes an ordinance, not specially for his own dominions, but general, it ought to run through the kingdom, and be supposed to be made with good advice, and for the common benefit; and the same jurist, Beaumanoir, repeats

this doctrine, with the additional important remark, 'that there is no one so great but may be drawn into the king's court for default of right, or for false judgment, or in matters affecting the sovereign.' We here perceive the influence of the king's judicial tribunal, the Parliament of Paris; and we shall presently consider, under the ensuing head, the influence of this court in confirming the legislative authority in the kings.

Yet the power of this or of any other tribunal would have been very insufficient to fortify the kings in this assumption, but for the ample increase of the royal power from the time of Philip Augustus, who reigned more than half a century before the period of which I am speaking. The kings ventured on acts of supreme legislation with great reserve at first, and many precautions were used to prevent alarm in their subjects at this exercise of a new power. They pretended sometimes that their ordinances were by the assent of the barons, or the chief of them; at others, they urged that it was by advice of grave counselors, who were often, it may be supposed, persons of great power and consideration. But a powerful cause of the final predominance of these royal enactments over the territorial and feudal jurisdictions, was the insufficiency of the latter to the purposes of justice; for we find that the first assumption of jurisdiction on the royal part, was in cases where the local jurisdictions could not minister adequate justice; and as the people gradually found the advantage of appealing to laws made on grave advisement, and with a view to a more general policy, the Parliament of Paris had abundant opportunities of widening insensibly the boundaries of the royal legislative, as well as judicial power. The assumption of the prerogative of taxation, as it was a delicate one, was the last in order, and certainly the most important in its effects.

As the barons originally enjoyed immunity from taxation in the whole extent of their fiefs, the resources of Philip the Fair, who was the author of an important innovation, were very insufficient, though his domains included many of the noblest cities of France. Having first, therefore, employed the expedient of levying taxes within the territories of his vassals, by their own consent, he ventured on the convocation of a representative body composed of the three orders of the nation, and termed the States General. They were first convened in 1302; but their first grant of a subsidy was in 1314. Thus arose a third estate, besides the barons and clergy, viz. the deputies of the towns, endowed with new franchises, and bearing a new relation to the monarchy. The policy of Philip in this step is obvious. He diminished the influence of the barons over these burgesses, thus brought into immediate contact with the crown, and no longer yielding their contributions through the medium of their lords; whilst he might expect those contributions to be larger than when they came through a discontented aristocracy.

Within the narrow limits to which I am necessarily restricted, I cannot inquire into the constitutional rights of these States General, nor trace their ineffectual efforts to add to their right of granting subsidies to the crown, some privileges favourable to their own independence, and to limiting the power of the throne. These would seem, as I have said, to have been very ineffectual; and the States General, after many contests with the sovereign, seem to have answered no purpose but countervailing the opposition of the aristocracy to the crown, and then to have fallen into the same insignificance. In course of time they ceased to be convened; the kings assumed to themselves the power of levying taxes; and having vanquished the rights and spirit of the aristocracy, disregarded, in like manner, the privileges and independence of the commons,

by whose aid they had achieved the victory. The commons, indeed, never seem to have had in France the consideration which more benign causes procured them in England, nor to have formed at any time an essential member of the constitution. I shall postpone what I have to say respecting the mutations of the legislative power in Germany, or the Empire, until I have taken a rapid view of the changes in judicial jurisdiction in France; a topic necessary to the perfect understanding of those of the legislative authority in that country.

(3.) Of the gradual abolishment of territorial jurisdiction; and of the substitution of royal judicial jurisdiction.

We have seen that the barons, among their other rights, possessed exclusive judicial jurisdiction in their own domains. This, like the others, was gradually abolished by the policy and increasing power of the kings; the first step in which was the enactment of that code which is known by the name of the 'Establishments of St. Louis.' By the wisdom which distinguished the rules of civil and criminal procedure in that code, and the principles of legal decision, (which discouraged, for example, the judicial combat;) by the adoption of a wiser jurisprudence in the royal domains; and, finally, by making it discretionary with the litigants in all civil suits, to adopt the law of the 'Establishments;' St. Louis gradually wrought a change which the gentler manners, and diminished superstition of the times promoted and corroborated.

By an ordinance in 1190, nearly a century before the Establishments of St. Louis, Philip Augustus established bailiffs or seneschals, who acted as judges for the king; and every barony, as it became reunited to the crown, was subjected to one of these officers. The vassals, therefore, whose lands depended on such reunited fief, became subject to the appellate jurisdiction of the royal court. In many cases, also, which were termed royal, a term the true extent of whose meaning was kept in studied ambiguity, the

territorial court was held to be incompetent; and these encroachments were attended by two other very important ones, viz. that vassals might complain in the first instance to the king's court; and that in all cases, the royal court might take cognizance of a suit unless the defendant excepted to the jurisdiction.

The Parliament of Paris, as we have before mentioned, was another great organ of the kingly jurisdiction. This supreme council of peers was the great judicial tribunal of the French crown, from the accession of Hugh Capet. It was originally composed of the king's great vassals, peers of those who were to be tried by it, and also of the household officers. But when the business of this court became vastly increased by the multiplicity of appeals, which might originally be made from any court on denial of justice, and which afterwards were much augmented by those which came from the bailiff's courts just spoken of, the barons found neither leisure nor capacity to sit there; and St. Louis, anxious for regularity and wisdom in its decisions, introduced into it some counsellors, chiefly ecclesiastics, to act as advisers. It now became known by the name of the Parliament; and though for some time ambulatory, it sat principally at Paris during the thirteenth century.

The character of a feudal court was soon lost in this stationary parliament: it was a regular tribunal, and not a loose aristocratic assembly. It was to hold two sittings in the year, and was composed of two prelates, two counts, thirteen clerks, and as many laymen. The nobility, however, grew weary of attendance; the bishops were dismissed to their sees; and lawyers gradually engrossed the whole direction of the tribunal. With them, however, sat the lay and spiritual peers of France, a title no longer applicable to all persons coequal in tenure under the king, but to twelve great feudatories, six of them ecclesiastical: this number, however, was augmented by successive crea-

tions. A judicial body thus constituted, was necessarily important and respectable; and it was deemed essential, at least as early as the close of the fourteenth century, that the king's edicts should be registered on its records, before they had validity as laws. This privilege was often used by that body for the public benefit; it frequently set itself in opposition to royal usurpation; and its struggles just before the commencement of the French revolution, are well known to modern history.

Thus, then, the kings regained for the sovereignty that right of dispensing justice which, though essential to the constitution of every well regulated state, had been wrested from it by the territorial privileges of the feudal barons; privileges which, we have seen, were the growth of anarchy and barbarism. The steps of their policy were slow but certain; and received force from their augmenting resources and consequence. We have already remarked that the kings first assumed jurisdiction where the lords' courts, from some particular circumstance, could not render complete justice to the suitors. This was a plausible ground for the assumption of jurisdiction, and proved a principal source of its amplification. An appeal, too, was provided on the ground of an unjust sentence; whenever the royal prerogative was supposed to be concerned; and lastly, where the suitors had election to decline the trial by combat. But perhaps as powerful an instrument as any, in the augmentation of the king's general jurisdiction, was the dignity and superior regularity of the royal courts. Yet as the king could not decide every cause in person, the next natural step was to appoint bailiffs or seneschals, with right of jurisdiction in different districts of the kingdom. Royal courts thus established in every quarter, the subjects would naturally resort to them; and as the administration of justice by the barons was, in the first instance, subject to several limitations, there were end-

less pretexts for obstructing and reviewing their proceedings. The king's supreme court, originally ambulatory, became, as we have seen, fixed as to the place, and regular in the time of its meeting. Skilful persons, also, were then selected to preside in it; and as the right of hearing appeals was its essential privilege, the final decision of all causes of importance was eventually brought into the Parliament of Paris, or the other courts constructed by the king in different provinces. To this important acquisition to the royal prerogative in the dispensation of justice, was added, as we have remarked, another not less important, viz. its legislative power. The assent of turbulent barons was no longer deemed requisite to the promulgation of a law: it was deemed sufficient that the decree was registered by the Parliament of Paris, a body which, though it stood often in the way of the violent exercise of royal power, was manifestly, from its constitution, too much under the royal control not to strengthen the power of the sovereign to a great degree.

There was one other material circumstance that limited and brought into disrepute the jurisdiction of the barons, which I am compelled merely to mention, but which is amply treated by the historians of this period, viz. the exemption of ecclesiastics from lay jurisdiction, and the establishment of their own peculiar courts. The forms of procedure in these clerical tribunals were regulated chiefly by the Roman civil code; they were founded on obvious principles of equity and good sense; and presented a regular system of decision and appeal. They were therefore preferred, even by a rude people, to their own barbarous and blind feudal jurisprudence; and the ecclesiastics, on their part, were not slow to fortify this influence. They extended their own personal exemption from other jurisdictions to so many persons, and to such a variety of cases, that a great part of the affairs which caused litiga-

tion, were drawn, by some device or other, within their cognizance. This was no inconsiderable aid to the advancing refinement of those ages; and to the establishment of corporations and communities, by the policy or indulgence of the kings, or both, in which the same code was the basis of procedure and decision, we may also ascribe a part of this increasing melioration.

I shall be excused for having dwelt so long on these modifications of the feudal policy in France, and its gradual change into the form which it wore during some centuries prior to the French revolution. For it should be remembered that this feudal form of polity being common to France with several other important European kingdoms, the history of its modifications and decline in one of them, is in fact essentially the history of that system in the others.

In Germany a like turbulence and confusion produced a correspondent change in the original feudal scheme. During the conflicts between the emperors and their subjects, more particularly during the existence of the factions of the Guelfs and Ghibellines, the adherents of the popes and the emperors respectively, the chief nobility, the dignified ecclesiastics, and the free cities usurped on the prerogatives of the emperors, and both claimed and exercised the rights of full sovereignty within their respective domains. All that has been said of the privileges of the French barons, and the disorder and disunion arising out of them, applies with equal force to the members of the Germanic Confederacy; so that from the accession of Rodolph of Hapsburgh, in the year 1273, to the reign of Maximilian, the predecessor of Charles V. in 1518, the Empire was the scene of every disorder. The very constitution of the diets was productive of anarchy. These originally were exactly the same with the assemblies of March and May in France: like them they met twice a year; and at them every freeman had a right to be present. But when the

princes, the dignified ecclesiastics, and the barons acquired independent jurisdiction, the right of suffrage was annexed to the territory or dignity; and if any member of the Empire made acquisition of a new territory in it, he was entitled to another suffrage. This league of independent states, for so it may be called, was productive of obvious disadvantages. The powers of the Diet extended to all common concerns of the German confederacy.

The Imperial Chamber was instituted by Maximilian I. to establish the authority of government, and to put an end to private wars in Germany. The diets were found inadequate, from their size and their unfrequent assembling, to decide the perpetual disputes of the confederates. To supply this defect, this tribunal, consisting originally of a president appointed by the emperor, and of sixteen judges, and supported by a contribution from the states of the Empire, was established to take cognizance of all questions of civil right between these states, and to judge in all criminal causes connected with the preservation of the public peace. It passed judgment in the last resort, and without appeal.

All causes relating to points of feudal right or jurisdiction, and such as respected the territories holden of the Empire in Italy, belonged to the jurisdiction of the Aulic Council, a tribunal formed on the model of the ancient Court of the Palace. All its judges were appointed by the emperor, and it has always therefore been the policy of the court of Vienna to extend the jurisdiction of this council, and to circumscribe that of the Imperial Chamber. And these two institutions, though far from perfect, remedied some of the inconveniences and oppressions of the feudal anarchy, and territorial jurisdiction, and gave something like authority to the emperors beyond the boundaries of their hereditary dominions.

Similar disorganization prevailed also in Spain, and like remedies were provided. But all these kingdoms failed to preserve from their assemblies of the people, a body like the English Parliament, constitutionally and practically the organ of the wishes of the people, and the depository of regular laws and of liberty.

It is hardly necessary to remark that, as all the feudal kingdoms bore a strong resemblance to each other, so the model of their general assemblies of the people was originally the same; and the diets of Germany, the states-general of France, the cortes of Spain, and the parliament of England, all sprang from this original foundation. But the fate of these several countries was different, according to the character finally assumed by these latter assemblies. We have shown how the diet of Germany became at last rather a congress of deputies of states, independent and dissimilar in their political organization, than a representative body of one free state; and how the parliament of Paris, at first a select council of the king, usurped the legislative prerogative which appertained to the Champs de Mars. The cortes of Spain retained for a longer time the spirit of the original legislative structure, though they yielded at last to the influence of those powerful causes which, throughout the Continent, elevated the royal prerogative above both the aristocracy and the people.

It is in England alone, of all the old countries, that we find an assemblage of the freemen of the state, retaining all its primary form and spirit. It was, indeed, subjected to many mutations of influence and structure; but it has, nevertheless, preserved to that fortunate country a sense of freedom, and a body of privileges, now known to no country in which feudalism prevailed.

Such, then, is a brief outline of the feudal scheme of government on the Continent; of its defects, its decline, and the causes which built up the modern monarchies on

its ruins. To have treated all these interesting topics with fulness, would have been not only superfluous, but foreign to the plan of these 'Outlines.' The subject, however, was too important to be passed over slightly, and what I have said may stimulate you to further inquiries.

PART THE SECOND.

Of the feudal system in England, and its influence on the jurisprudence of that country and of the American States. **DIVISION VIII.** Having described the general nature of the feudal system, as it existed on the Continent, I proceed to the consideration of it as it was manifested in England, from the earliest times to its virtual abolition in the reign of the second Charles. And I shall close the lecture with a brief inquiry as to the influence of this long prevailing system on the jurisprudence of England and of this country, and the necessity of making the laws and institutions of the feudal ages a subject of diligent examination by legal students.

(1.) Of the æra of the introduction of feuds into England. The true æra of the introduction of feuds into England, has been a point on which there has been much diversity of opinion among antiquarians; Lord Coke, Selden, Nathaniel Bacon, Gilbert Steuart, Mr Turner, &c. contending for their existence in that country before the Conquest; and Madox, Craig, Spelman, Hale, Somner, Sullivan, Hume, Houard and Bawdwen ranging themselves on the opposite side; whilst Wright, Blackstone, Dalrymple, Watkins, and Lord Kaimes take something of a middle ground.

When it is recollected that the feudal system was not brought by the invaders of the Roman empire into their conquests, but that it resulted from their circumstances after their establishment there, and after a long series of years, it is not surprising that these invaders, although of common origin, should be found living under different systems of policy. The Saxon invaders of England

are said to have been a cruel and extirpating race. They put the ancient inhabitants of Britain to the sword, or drove them into France and Wales, instead of settling themselves among the conquered, as was frequently the case on the Continent. The nature, also, of their incursions, made in separate bodies, and in quest of distinct settlements, would be apt to cause a greater slaughter of the natives. Hence there was no want of vacant lands, and no severe duties, consequently, could be required in return for the grant of them. Moreover, the adventurers who came over being independent plunderers, their attendants would be rather their associates than their feudatories; and this, among other causes, produced the numerous independent kingdoms of that island. Every point in these characteristics of the Saxons is, we think, at war with that regular dependency which marked the feudal system, and would prevent its prevailing at that time in Britain, especially as it was protected by the sea from foreign enemies.

Such being the probable reasons, among others, of the Saxons differing in institutions from their brother barbarians of the Continent, let us examine whether the fact of this difference be established. And it may be remarked, by the way, that the general resemblance of the barbarian forms has misled authors, we apprehend, into a neglect of their minute differences. Those writers who could trace the origin of feuds in the military donations of land among the Romans, would be yet more likely to be imposed on by the greater similarity of the Saxon manners and institutions to those of feudal countries. Besides, the fact of some few of the Saxon lands being granted as military benefices for life, (if they ever were so granted) has led to a supposition that these prevailed more generally, and produced larger feudal consequences, than, in my opinion, we are justified in supposing from the Saxon history. In fact, many of the very reasons usually urged to prove that lands

in the Saxon times were held as feudal inheritances, prove rather the contrary. Thus, for example, the Saxon lands were certainly hereditary; but those of the Greeks, the Romans, nay even the allodial lands in the conquests of the barbarians themselves, were the same. Indeed, the military benefices on the Continent were not, as we have seen, hereditary at first; so that this argument is rather adverse to the point which it is brought to prove, since, though a proper feud is a hereditament, yet we know that the very genius of the early feudalism excluded hereditaryness. The Saxon lands were alienable at the will of the owner; they were not forfeitable for felony; and they were divisible among all the sons,—which fiefs were, only in their infancy, if they ever were. As to the military service to which they were subject, the allodial lands in other countries were also subject to it; and indeed every nation must necessarily exact such service from the members of the state. It differed, however, in several essential particulars from the feudal military service. The Saxons served as foot soldiers, and not on horseback and in complete armour, as the feudal tenants did, who also went to war only on summons. The Saxons had regular musters for the preservation of discipline, and their military duties were exacted and performed in a manner similar to those of our militia; but the feudal tenants were obliged to serve forty days, and this, too, at their own expense, and wherever the king pleased, in a just or defensive war; nay, in an unjust and offensive one, by the rule of William the Conqueror. Among the Saxons, the obligation to military service appertained to the land in proportion to the quantity held, every hide of land (consisting of about 115 acres) finding one man, and there being no necessity for personal attendance, nor any pecuniary commutation for it. In his own county the soldier was supported by the hide of land; in another county he was sustained either by his king or by

that county. These are great and characteristic differences, and indeed have scarcely a feature of feudalism in them.

Again. The arguments in favour of the existence of feudalism in England prior to the Conquest, derived from the existence of Heriots, and the supposed oath of fealty among the Saxons, are open to equal objection. Heriots cannot be justly likened to Reliefs; for these last were demandable of the heir only, who could not even enter on his lands until the relief had been paid. The heriot, on the other hand, was paid out of the tenant's personal estate, and by the executor or administrator. The oath of fealty, also, was made by the feudal tenant to his lord; and even when made to the king, it was in respect of the tenure of land, and as his lord; whereas the oath taken among the Saxons was to the king only, and as king, not as landlord; and was neither more nor less than an oath of allegiance, being taken by every male above the age of twelve, whether landholder or not.

It seems, however, to be the opinion of many respectable writers on this subject, that some lands in England were held before the Conquest as military benefices or feuds; but the better opinion is, that they were benefices for life only, unattended by the feudal incidents of wardship, marriage, relief &c. and that no inference, consequently, in favour of the existence of feudalism in England at that time, can fairly be drawn from this fact.

Dalrymple, a very judicious author, is of opinion that lands among the Saxons were both feudal and allodial, as was the case among the continental nations; and thinks that this is proved by their well known distinction between *Thaneland* or *Bockland*, and *Reveland* or *Folkland*; the first of which he conceives to have been feudal, and to have been granted to, and under the jurisdiction of, the Thanes or great lords; and the second to have been allodial, and presided over by the King's officer, the Reve or Sheriff.

This distinction, he confesses, is differently explained by other historians, lawyers and antiquaries. It is highly probable that large grants of land to the thanes were thought to require more authentic memorials than ordinary, and might thus be called Bockland; and it is quite likely that these lands being cultivated by villains, the lord exercised over them an arbitrary jurisdiction different from that exercised over allodial proprietors. Nay, the very fact that the possessors of allodial or Folkland were called *Liberi*, in opposition to the slaves, or tenants of the thanes, demonstrates the position just stated; for in feudal countries the *liberi* were both feudal and allodial proprietors, and indeed this was a term which implied a warrior, or one bound by his tenure (if bound at all) to military, and not to base services. The same term, therefore, among the Saxons expressed probably the freemen, whether the great thanes or smaller landholders, in opposition to the villains or slaves who cultivated the grounds of both. Mr. Hume, however, gives a different explanation of Bockland and Thaneland; the first he supposes was land held by book or charter, which was regarded as *dominium plenum*, full property, and was hereditary; the second was held by the common folk or people, who were removable at pleasure, and were nothing more than tenants at will.* That the Bockland of the Anglo-Saxon codes was in most respects similar to the Alodis of the continental nations, and that the Folkland of the same codes remotely resembled the lands held in feudal vassalage, cannot be doubted; but this goes but little way, if any, to establish the existence of feuds in England in the time of the Saxons.

As to the opinion of Gilbert Steuart, who, in his 'View of Civil Society in Europe,' has laboured to establish the existence of feuds in England anterior to the Conquest, I cannot but remark that it appears to me extremely ill sup-

* 1 Hume's Eng. Appen. 195.

ported, his citations being few, and, for the most part, very inapposite. The perusal of that part of his work which aims to establish this point, is sufficient, we think, on his own showing, to prove to the considerate reader the weakness of the theory. We refer the student to the eleventh note on his second chapter, for this author's interpretation of the grant of Cumberland to Malcolm, king of Scotland, by king Edmund, in which he will see a fair specimen of his forced constructions and illogical arguments. Steuart is a champion of some celebrity on that side of the question, and we regret that our limits do not allow us to quote the passage alluded to, and to comment on it, not only that we might urge it in support of the opinion we have adopted, but as a sample, among many others, of the prejudice of writers when they espouse party sentiments, or apply themselves to the support of a favorite theory. We shall have occasion again to advert to this subject at the close of the present lecture.

The enlightened commentator on the laws of England is disposed to compromise this difference of opinion, by admitting that an imperfect system of feuds subsisted among the Saxons long prior to the Conquest.* We are inclined, however, to believe that the faint traces of feudalism relied on by these writers in support of their respective theories, are not strictly feudal characteristics, but belong to the policy of nearly every nation in its primitive history. Hence the thaneland, bocland, folkland, &c. and the several orders of men, the noble, the free, and the slaves, who went under the names of the king's thanes, lesser thanes, ceorles or husbandmen, and villains, afford no evidence of feudalism, the like distinctions existing among most other people.

On the whole, then, we may conclude, and with the authority of many eminent antiquaries, and one illustrious

* 2 Blackstone's Commentaries, 47.

historian, Hume, in our favour, that the feudal system, whatever slight resemblances may be found to it in the institutions of the Saxons, was unknown to them before the Conquest. According to this better opinion, it is to William the Conqueror that we must look for its introduction.* We shall now proceed to a more particular examination of this system, as it afterwards manifested itself in that country.

(2.) Of the changes effected by the Norman invasion. The Norman conqueror found himself at the head of a victorious army to which the dispirited and vanquished Saxons could offer no effectual resistance. Having extinguished the last sparks of national spirit, he set himself to modelling the government to his own views, without regard to the rights or complaints of the Saxons. He shared most of the lands of the kingdom among his Norman adventurers, on the plan of the feudal government of France, and invested the most distinguished of these with enormous estates and revenues. He gave, for instance, to his sister's son the whole county of Chester; to the Earl of Montaigne nine

* A few writers have sometimes inadvertently applied the word *tenure* to the Anglo-Saxon holdings. That there were conditional, and occasionally stipendiary grants among the Saxons, is undeniable; but these are very different from the *tenure* of the feudists. We think that Mr. Turner, a very able antiquarian, has fallen into this error in his history of the Anglo-Saxons. He alludes to the *habendum* of their grants, as determining the nature of the tenure; but it is far more probable that the *habendum* was used then, as it is now, in order to fix and define the interest of the grantee, and not with a view of creating a tenure, properly so called.—Vide Turner's *His. Anglo-Saxons*, 207, 222, 225. The word *tenure*, indeed, has a strictly technical and feudal meaning, and imports, not only a holding, but a feudal relation thereby established between the tenant and his superior lord. In after times it sometimes assumed a more popular signification, synonymous with the word *title* or *estate*. Those who are seised of allodial estates are often called *tenants*; so also the king is said to be seised in his demesne as of fee; but in both these cases, nothing more can be meant than the title or quantity of interest vested in the allodial tenants and king respectively.

hundred and seventy-three manors and lordships; and to the Earl of Brittany and Richmond four hundred and forty-two manors.*

It has been a subject of surprise that the Conqueror could thus easily deprive the Saxon proprietors of their lands. But it is extremely probable that the Saxon government was highly aristocratical, the property in few hands, and the common people tenants at pleasure, and therefore careless of whom they held such a precarious interest in the soil. The forfeiture, also, of many large estates for treason, accounts for so much of the landed property passing so immediately, and with so little tumult, into the royal hands. It was easy, too, to model the rest after the same fashion; for although the Saxons were a brave race, they were extremely rude and ignorant, intemperate and riotous, and, moreover, were rather remarkable for their want of loyalty and fidelity. A conquered people of this kind, whom even the Normans regarded as barbarians, could not be expected to make much resistance to any innovation, especially when the thanes, who had monopolized most of the lands, were themselves completely subdued, and at the mercy of the Conqueror. Hence was it that William in fact, by the concurring authority of most historians, converted England *per saltum* into a feudal kingdom, so much the more rigorously feudal as his authority was naturally great both over the invaders and the invaded. The whole kingdom was divided by him into sixty thousand two hundred and fifteen knight's fees, held by about seven hundred chief tenants; the ecclesiastical lands and revenues being reduced under the same feudal law as the lay, and liable to the same military service.

* The curious student, who may desire to know the extent of the landed monopoly consequent on the introduction of feudalism by the Conqueror, may consult Bawdwen's Domesday Book, translated, and published, with a glossary, in the year 1809.

(3.) Brief examination into the nature of English feuds. Such a system was obviously wholly warlike in its character. Accordingly, we find the military tenures to have existed in their full vigour in England. Of the incidents of these, as they existed in the feudalism of the Continent, I have already spoken, and shall have the less to say in regard to their character in England. I have also explained the various kinds of improper feuds known to the feudal jurisprudence of the Continent. In England they were also of ten kinds, which it will be sufficient briefly to mention, as they varied in no very material respect from those already described. They were as follows. 1. Tenure in frankalmoigne. 2. Tenure without the oath of fealty. 3. Land held under some condition which might extend it beyond the tenant's life, or determine it before his death. 4. Lands held by any other than military services, or even by military, if certain. 5. Lands held by civil and defined services, called soccage, a tenure destined to grow into paramount importance, and to become the tenure of nearly all English lands. 6. Tenure by the oath of fealty only. 7. Grand serjeantry, whether military or civil, the services being certain. 8. Petty serjeantry. 9. Grants to female tenants, as they served by deputy, personal services being essential to the notion of a proper feud. 10. All grants of incorporeal things. The principle which characterizes each of the foregoing as an improper feud, distinctly manifests, also, the strict idea of a proper feud, to the consideration of which we have now briefly to advert.

We have seen that the essential reservation on all proper feuds was military service. But in addition to this, the king and lords in England were entitled to Aids, which originally were mere gratuities of the vassals, bestowed on some great festal occasion, or to relieve some very pressing necessity of the king or lord. They differed in no material respect from those which were customary on the Con-

tenant. In regard to the doctrine of Escheat, which has also been mentioned, I have only to observe that, besides the actual failure of heirs, the feud was liable to escheat to the lord *propter delicta tenentis*; and originally these offences were very numerous. These forfeitures, however, being resisted, and very naturally, by persons who had paid for their land, a total change in this respect was gradually effected, and at length scarcely any injury done by the vassal to his lord induced an escheat of the feud; but the escheat for crimes against the publick remained; as, for instance, for treason and felonies, of which the consequence was *corruption of blood*, the failure of heirs, and the necessary escheat of the feud. In this case the land, on account of the crime against the publick, went to the king for a *year and a day*, and then fell to the particular lord of whom it had been held. It is proper, however, to remark that the king's year and a day in the lapsed feud was not a direct consequence of the subject's crime, but is supposed to have thus originated. The vassal's land originally belonging to the lord, reverted to him or his heirs whenever the vassal became obviously unworthy to enjoy it longer. But the personal estate, or moveables, being of his own acquisition, was the only fund that could be resorted to for the discharge of the debt which he was supposed to have contracted by his crime to the publick. It being necessary, therefore, that the magistrate should have some time to collect these goods, custom at length gave to the king's minister the year and the day above mentioned, for that purpose. In lawless and oppressive times, however, we find that this magistrate often committed, for the benefit of majesty or himself, the most ruinous waste on the escheated lands; so that the lords found it their interest to commute this privilege by allowing to the king uniformly a whole year's rent in anticipation. The same rule of escheat obtained in cases of treason, after the establishment of rear-vassallage,

until the famous statute of Treasons, 25 Edward III. chap. 2, which made lands forfeitable to the king on the tenant's treason, notwithstanding they were holden of lords, and not of the king *in capite*. Thus, while escheat is by the common law, forfeiture is said to be by statute.

The nature of Reliefs, another feudal incident, has also been explained in the first part of this lecture. In England, a year and a day were allowed the heir to make his fealty, and to pay his relief; within which time if he failed to do so, he forfeited his right of succession, and the lord was at liberty to dispose of it to a stranger: this was called the right of Non-entry. The reliefs, being at first arbitrary, occasioned many struggles in England. It appears that the discontents which arose on the Continent from vexatious and uncertain reliefs, induced William the Conqueror to fix the rate of them according to the ranks of persons, and the value of their estates: but William Rufus having exacted arbitrary reliefs, the grievance was redressed by the charter of Henry I. Yet we find that though in the time of his grandson, Henry II. this certainty continued as to the relief of a knight's fee, it did not obtain as to that of a noble fee, a difference ascribable to the precarious state of the nobles, many of whom had been attached to the cause of Stephen. Under John these exactions became excessive, and produced the first article of temporal concern in Magna Charta. This fixed the relief at the fourth part of the annual value of the inheritance. The lords, when they began to grant inheritances to their soccage tenants, exacted from every new possessor a year's value, or double the rent of the first year.

The Fine for alienation was also generally a year's rent; but to avoid this fine, the vassals adopted the plan of subinfeudation, making thereby the conveyee of the feud to hold of the conveyor, instead of the original lord, whereby that lord lost in a great degree the incidents and fruits of

the tenure. This practice of sub-infeudation, as distinguished from alienation, prevailed so extensively as nearly to threaten the existence of feudalism in England. If, for example, A were lord, and B his tenant, B could not alienate any part of the feud, except with the lord's consent, and on paying a fine for alienation; and in this case C, the purchaser or alienee, would hold the feud of the lord A, and not of B. But in the case of a sub-infeudation by B, he merely carved out a new feud to C, who would hold the feud of B by such services as should be reserved, whilst B continued as before to hold of his lord A. Here, then, it was manifest that A could demand no fine for alienation, for a legal or technical alienation was not made; and B though bound to services as usual, might be less able to render them. Thus was taken away, not only the necessity of A's consent to the transfer of the land, and his fine for alienation, but also the other fruits of tenure; and the tenant gained his object nearly as effectually by sub-infeudation, as he could have done by unrestricted alienation. To correct this practice, not however with the view of preserving the fines for alienation, the celebrated statute of *Quia Emptores Terrarum*, 18 Edward I. was passed. By that statute the vassal was allowed the full liberty of alienating the feud; but the alienee was compelled to hold the lands of the alienor's lord, and not of his own grantor. Sub-infeudation being thus wholly abolished, and alienations allowed, the fine for alienation of course ceased from that time; except that the immediate tenants of the crown not being embraced by the statute of *Quia Emptores*, this fine continued to be demandable from them until, by the abolition of knight's service in the reign of Charles II. all tenants were placed on the same footing.

What has been heretofore stated in regard to the feudal incidents of Wardship and Marriage on the Continent, will

be found to apply very generally to them as they appeared in England. Although wardship of lands held by military tenure be intelligible enough on the principle of that tenure, it is not quite so easy to explain the lord's right of wardship of the person. In soccage tenure, the wardship of the latter, as well as that of the land, belonged to the next of kin who could not by possibility inherit the estate; a regulation much commended by the admirers of the common law, as contributing to the preservation of the heir's life. The committal of the heir of a military tenure to the custody of the lord of whom he held the lands, arose in part, if not wholly, from the genius of the age, which indicated as the proper instructor of the heir in warlike exercises, him who was afterwards to receive the benefit of his services; and partly, also, from the justice of burdening with the support and sustenance of the heir, him who had in his hands the whole of the heir's lands. But whencesoever this may have arisen, the lord had the custody both of lands and person, unless the minor's father were living, who was guardian by nature, and was therefore entitled to the custody of his person. The age of twenty-one years was the period of minority in males, and fourteen in females; the man being deemed capable of bearing arms, and the woman of marriage with some one capable of the feudal duties, at those respective ages.

Thus much of the feudal incidents of military tenures in England, which were nearly the same as those on the Continent, already spoken of. We may advert however, for a moment, to the subject of Homage and Fealty. The former was done for an estate of inheritance only, and the latter for an estate for life. Homage did not require an oath, as fealty did, which was made with great solemnity on the book. In England, therefore, homage and fealty were always kept distinct, the homage being first done for the more durable estate, and afterwards the fealty. But

on the Continent, in some countries at least, they were blended by the homage being done upon oath, and including all the obligations of fealty. Another difference was, that in England a tenant, having performed homage to the ancestor, did not repeat it to the lord's heir, as was always done in France. In England, also, the lands for which either homage or fealty was done, were always specially enumerated for the benefit of the lord and tenant, as also for the information of the *pares curiæ*, which was not the case on the Continent.

(4.) Of the Custom. It has been stated in a preceding section, that the Conqueror divided the kingdom into 60,215 knight's fees, all of which were held by a feudal military tenure. But there existed at the time of the Conquest, another species of holding, called Gavelkind, which continues to subsist in the county of Kent, and is a solitary relic of the Saxon estates. Lands thus held were not forfeitable for felony, whence the proverb of that country, '*the father to the bough, yet the son to the plough*;' and on the death of the ancestor, the lands descended equally to all the sons; or if a brother died without issue, his lands went equally to his brethren. It has been said that, prior to the Conquest, all the lands in England were of the *nature* of gavelkind. This specific holding was preserved only on condition of making the eldest son the sole heir; and this was done throughout England, except in Kent, where, according to an old English author, the Kentishmen surrounded the Conqueror with a moving wood of boughs, and successfully urged him to confirm them in their ancient customs.

So late as the reign of Henry VI. all the lands in Kent were held by gavelkind, except those in the possession of a few wealthy individuals. By the statute 31 Henry VIII. on the petition of many Kentish gentlemen, most of the lands of that county were disgavelled, and now de-

scend to the eldest son, according to the course of the common law.

The privileges of the custom by gavelkind were very great. 1. The tenant was capable of alienating by feoffment at the age of fifteen. 2. The estate did not escheat for any crime committed by the tenant, except treason. 3. The estate descended to all the sons equally. 4. If a father had two sons, one of whom died during the life of the father, leaving a daughter, that daughter inherited *jure representationis* the part which would have descended to her father; for though daughters were generally excluded, yet they could inherit by representation. 5. Gavelkind lands were often devisable. 6. The wife had a moiety of her husband's lands as her dower, but during widowhood only, whereas the common law gives one-third for her life. 7. The husband had curtesy in one half of his wife's lands, though he never had issue by her; but he forfeited the estate if he married. 8. If the husband had issue by his wife, he then took all the lands by curtesy, and retained them during his life though he should marry. 9. All lands in Kent are presumed in law to be gavelkind, and in any judicial pleading, they need not be averred so to be; for the disgavelled lands, though at this time very general, are still regarded but as exceptions to the custom, which is the law of the land of that county. 10. The special custom of devising lands in Kent, is a matter which the courts *ex officio* do not notice: it must be pleaded, as the custom was not a general one appertaining to gavelkind lands.

It has been supposed by some that this holding is merely a modification of the soccage tenure by county customs; but others think that the high privileges we have enumerated did not belong originally to mere sockmen and peasants, and that gavelkind is more likely to have been the progenitor than the offspring of the soccage tenure. There arose after the Conquest some other tenures, whose origin

will be best explained by some account of the different ranks of subjects in those times.

(5.) Of the different ranks of subjects. Various other tenures introduced after the Conquest.

At that period the people of England were divided into three great classes; 1. the Nobility; 2. the Gentry, or lesser nobility, likewise called *Armigeri*, from their fighting on horseback in complete armour; and 3. the Commons. The Commons, again, consisted 1. of Citizens and Burgesses, whether merchants or artificers; 2. of *Soccage* tenants; and 3. of Villains; the two last of whom were the cultivators of the soil. The number of *soccage* tenants was so few, or perhaps their privileges so inconsiderable and uncertain, that they are scarcely distinguishable from the villains, although doubtless many of the inferior Saxon landholders must have arrived at this stage of their progress to freedom and property, anterior to the Norman conquest. From the villains, however, the *soccage* tenants principally arose, as also the tenants in Ancient Demesne, and Copyhold tenants, of after times, whose privileges and consideration grew with the progress of trade and agriculture, and who now form the great body of the English commons.

The word *soccage* is derived by some from *soca*, a plough. Somner takes it from the Saxon word *soc*, liberty or privilege, denoting thereby a free or privileged tenure. This tenure is defined by Littleton to be where a tenant holds by any *certain* service, in lieu of all other services, so that the service be not military, or knight's service. It is probable that it takes its name from *soca*, as before stated, and that the original reservation was the ploughing of the lord's lands, more especially as these tenants, taken from the inferior ranks, and even from the villains, would scarcely bear the designation of *soc*, *free* or *privileged*, when all the nobility and gentry of the nation held by the honourable tenure of knight's service, which, in contradis-

inction to that of Soccage, could not be considered less privileged and free. I am not disposed, therefore, to adopt the notion of some, that soccage tenure had a more noble origin than what has been generally given to it, and that gavelkind is merely a modification of this more privileged holding.

Of these soccage tenants, the Burghers, or inhabitants of the towns, were perhaps the earliest in obtaining defined privileges, and some security of estates. Being generally merchants and artificers, they collected, from various motives, into small communities, and their usefulness naturally procured them some small immunities. On the Continent, more particularly in France, the kings, indeed, found their account in fostering the communities or boroughs in opposition to the slavish dominion of the lords over their vassals; and a similar policy might, when these boroughs obtained some consequence in England, have led to similar effects. We know that enfranchisements were granted to the burghers; charters and privileges conferred on them; their taxes and lands given to them in fee-farm; and a new free tenure finally brought into the law, known as Tenure in Burgage.

But the great body of the inferior classes were the Villains. This order of men seems, among all the northern nations, to have been formed out of the captives taken in war. The depredations of the Danes, and the wars of the Heptarchy, made them very numerous; and they were in a state of servitude to which were incident the most ignoble, laborious and servile offices. They were of two kinds; villains *in gross*, and villains *regardant*; the first belonging to the person of the lord, the last annexed to the land, and transferrible with it. It seems to have been usual to divide a manor into four parts; one for the military tenants of the lord; another for the soccage tenants who ploughed his demesne, or rendered to him corn, cattle &c.

a third for the support of the villains who were employed in felling timber, carrying manure, making inclosures, and such like offices; and a fourth was permitted to lie fallow or waste, for commoning the cattle of all these. It may be seen from this distribution, that there being, in most manors, land set apart for the use of the villains, called Villain-land, it might retain its name, and be liable to the same services, even after it came into the hands of freemen. But as in this case the services would at least be reduced to certainty, the tenure, though called villenage from the low nature of the duties, was properly soccage, certainty of services being the distinguishing feature of that tenure. And, in time, the base duties themselves being commuted for money rents, these tenures became the most advantageous of any, as they were relieved from their servile character, on the one hand, and made determinate in their extent, on the other.

The nature of the tenure in villenage becoming thus gradually changed for the better, and the unhappy condition of the villains themselves much amended, the law favoured their enfranchisement in various ways; and we find that the courts not only gave the most favourable interpretation to express emancipations, but, in a manner similar to that practised in the Roman law, sanctioned various implied modes of emancipation. Thus, for example, if the lord executed to his villain an obligation or other contract; or granted an annuity to him; or executed to him a lease for life or years; or enfeoffed him; or sued him in an action, and recovered, or was nonsuited after appearance; or if the lord married his niece, or female villain; in all these cases the villain was manumitted by implication of law. By the Roman law, if a slave who had been enfranchised became markedly ungrateful to his former master, he could be reclaimed. This, however, was never the case in England, the maxim there being, *semel manu-*

missum, semper liberum. The implied manumissions were more numerous than those we have stated; but these sufficiently illustrate the principle. It was also usual for the lord to emancipate villains expressly, in order to convert them into soldiers and adherents.

From this class also arose the Copyhold tenants; for it frequently happened that a succession of humane lords forbearing to seize their villains' goods, or to exact villain services, memory and proof of their servile condition would be wanting, and they thus emerged into the rank of freemen. As to their lands, although the lord could not assure them to the villain by deed, (for this, being a contract, would impliedly have emancipated him) yet the lord, desirous that his villain should have some permanent estate, as a bounty or reward perhaps for some eminent services, would enter on the roll of his court that he had given such a one an estate at will, to hold to him and his heirs, or the heirs of his body; and this customary memorandum or direction being complied with, grew at length into an established right, and such tenant was called 'Tenant at will, according to the custom of the manor,' or Copyholder, the evidence of his estate being a copy of this entry in the lord's court-roll.

Tenants in Ancient Demesne were either soccage tenants, freeholders or copyholders; and, whether one or the other, they had some peculiar privileges, as they occupied the king's lands. These ancient demesne lands were the estates which the king had, as king, to support his family and other expenses, and were originally unalienable by the crown. But as the king could not cultivate them himself, they were given out to soccage or villenage tenants, who, from being supposed to be always in the service of the king, possessed various immunities. Thus, they were exempted from taxes imposed by parliament, unless specially named; they were not taxed for the pay of the knights of the

shire; they paid no toll for goods in market, if they concerned husbandry and sustenance; they were exempted from serving on juries; nor were they impleaded in any but their own manorial courts. These high privileges continue at the present day, though the services to which their tenure subjected them, have mostly been changed into money, and the estates have very generally been alienated from the crown.

(6.) Of the Royal Revenues, and their various mutations. The alienation of the demesne lands, and the decline of the feudal services and incidents, is, as connected with the royal revenues, a topic of some curiosity, and of additional interest because not slightly interwoven with the progress of liberty, and the rise of the Commons. Before, however, we proceed to an examination of this subject, it may be useful, as a preliminary, to explain a variety of terms frequently occurring in the juridical history of England, and concerning which students have often not very definite ideas. The terms alluded to, are Scutage, Talliage, Hidage, Customs, Subsidy, Aid, Benevolence, Tenths and Fifteenths, Tax and Exeise. A brief explanation of these will better enable us to trace the various mutations which have taken place in the royal revenue, and the means of supporting the English government.

1. SCUTAGE and Escuage are synonymous terms. Every tenant of a knight's fee was originally bound to serve the king in his army forty days in every year. This personal attendance growing onerous, the tenants compounded for it, first by sending a deputy, and afterwards by making to the crown a pecuniary satisfaction. This composition came at last to be levied by assessments, at a certain sum for every knight's fee, under the name of Escuage or Scutage, from *scutagium*, a shield. Some authors, however, have derived this word from *scutum*, a coin known in those days.

The first recorded instance of a pecuniary commutation for personal military services, occurred early in the reign of the second Henry, when he planned his expedition against Toulouse. Shortly after this, it became very general, and, from circumstances, very onerous; so that in the reign of John it was provided by Magna Charta, that no scutage should be levied by the king or any lord, but by the consent of parliament. The charter of Henry III. omitted this provision, so that the prerogative of imposing it was exercised as in the time of Henry II. Subsequent statutes, however, ordained that no escuage should be imposed but by law; and from this power of parliament originated the Subsidies and Land Tax of more recent times.

Escuage was of two kinds, viz. uncertain and certain. If the commutation were uncertain, the tenure remained knight's service; if certain, it became soccage; and Littleton says that when escuage is spoken of generally, it means uncertain escuage; or, in other words, that the tenure by knight's service is ever presumed in the first instance; but if the escuage be specially referred to as certain, the tenure is without doubt soccage. It has been contended by some that escuage of any kind is not a tenure or service at all, but a mere incident of tenure, as homage is. Of this opinion is Madox. In his *Treatise of Tenures*, Wright has taken, however, a middle ground, insisting that though, in general, uncertain escuage was a fine, or sum of money, payable as a commutation for personal services, yet anciently a payment of money in proportion to the quantity of land held by tenants in knight's service, was sometimes a service originally reserved, and that in such cases the escuage was certainly itself the tenure, and was so called in contradistinction to the genuine tenure by knight's service. It is manifest, however, (admitting Wright's views) that Madox's observation applied altogether to the common idea of escuage, viz. the commutation of personal military

services for money or other things. Still we think that Madox can be only partially correct; for if the escuage be fixed, as it then becomes soccage, the escuage constitutes a tenure, and cannot be regarded as a mere incident: it becomes then as much a tenure in soccage as if it had been originally so reserved.

2. **TALLIAGE** or Tallage. This was an assessment laid by the king on such of his demesne lands as lay in cities or boroughs; or by the lords who held lands in such places. As the military services were converted into escuage, so the services imposed by the tenure in burgage, which was a soccage tenure, were also exchanged for a regular pecuniary assessment, and talliage was to the burgage tenure, what escuage was to the tenure by knight's service.

3. **HIDAGE**. In the Saxon times every hide of land supported its soldier, and there was not, as in feudal times, any personal service; but the land itself was liable to yield certain fruits, which enabled the crown or the lord to carry on wars. After the Conquest, this continued to be the case as to all lands not feudalized. The hidage, then, was a pecuniary composition paid by tenants holding hides of land, in lieu of the grain, provision or work which otherwise would have been due in proportion to the number of hides tenanted by them. These hidages were at all times fixed as to amount, and time of payment.

4. **CUSTOMS**. These were sums of money, or portions of a commodity, payable by merchants to the king; which dues being established by long usage, took the name of *customs*. They were payable by natives, denizens and strangers, and were perpetual; whereas talliages, subsidies &c. were imposed occasionally. How these customs have been variously modified in modern times, will be known to the student in the course of his professional reading, and will be briefly observed on when we come to speak of taxes.

5. **SUBSIDY.** This was introduced about the time of Richard II. and Henry IV. and took place, in some degree, of scutage, hidage, talliage &c. as a source of the royal revenue. It was imposed, not immediately on property, but on persons in respect of their imputed estates, after the nominal rate of four shillings in the pound sterling, where the valuation was on lands, and two shillings and eight pence in the pound on goods. The merchandise of aliens paid in a double proportion. The clergy granted their subsidies separately from the laity. The assessment of a subsidy was made according to an ancient valuation of the landed property of the kingdom; so that one subsidy, at that low valuation, raised but about seventy thousand pounds. No more than one subsidy, and two fifteenths on personal estate, were anciently granted at any one time; but the Spanish invasion in 1588 induced parliament to depart from this long established rule, and Queen Elizabeth had two subsidies and four fifteenths granted to her. As money sunk in value, these subsidies were granted in greater numbers, so that in 1640 Charles I. desired twelve subsidies from the House of Commons, payable in three years. I decline, as the student of English history cannot fail to become familiar with them, to dwell on the various kinds of subsidy; such as the Inward or Old Subsidy; the New Subsidy, the One-third Subsidy, the Two-thirds' Subsidy, &c.

6. **TENTHS AND FIFTEENTHS.** These were temporary assessments issuing out of the personal property of the kingdom, and were granted by parliament as exigencies demanded. They were originally an actual tenth or fifteenth of the personal estate, that is, every tenth lamb, sheep, hog, fleece, bushel of grain, &c; but if they were ever paid in kind, it must have been at a very early period of English history. The ninths, tenths and fifteenths, therefore, must be considered to mean those respective proportions of a defined valuation of the personal estate of the

kingdom. The personal estate of every county and shire was valued in the reign of Edward III. and amounted, at the low rate of valuation employed, to twenty-nine thousand pounds for the whole kingdom. Hence, when in more modern times parliament granted two fifteenths, for example, every county, having the scale of valuation as recorded in the Exchequer, could at once ascertain its proportion of the tax, and those amounts were collected into the royal treasury. The tenth was the same tax in corporate towns, as the fifteenth in the counties and shires, the former being liable to pay only the tenth, whilst the latter paid a fifteenth part of the valuation put on personal estate. The tenths and fifteenths were of course invariable in amount, and differed in this respect also from a subsidy.

7. AID. When the ordinary sources of revenue failed to be effectual, a general contribution or Aid was granted. The three customary ones for the purposes of making the lord's eldest son a knight, for marrying his eldest daughter, and for the redemption of his person from captivity, have been already explained, but are not the aids to which we now allude as being a source of royal revenue. The king occasionally requested or demanded aids to meet some unexpected emergency of the state or of his household. As these were often gratuitously granted, or supposed to be so, they also took the name of

8. BENEVOLENCES. Whether these occasional sums were in fact exacted by the king, or granted voluntarily by his subjects, or as loans to enable the crown to prosecute some favourite enterprise, they were called by the general name of benevolences.

9. EXCISE. Customs are duties paid to government on goods imported from foreign countries, or exported to them; or on goods carried coastwise. The chief source, however, of revenue from customs is imported merchandise, the customs on exportation being chargeable on only

a few articles; and those on commodities carried coastwise being imposed only on coals, slate and stone. The duties of Excise, on the other hand, are altogether an inland imposition, charged on a great variety of articles, either on their consumption, or, more generally, on their retail sale.

The extreme unpopularity of excises arises, not from their intrinsic inequality or injustice, for in this respect, as well as in some others, they are preferable, as a mode of taxation, to the customs; but from the arbitrary and summary manner in which they have at all times been collected. The facility with which such duties might be evaded, induced government to appoint for their collection commissioners and officers invested with the power of searching houses at any time of the day, and, in some cases, even by night, for exciseable commodities. These powers are also very summary; without trial by jury, and with little limitation from the general principles of the common law.

Such powers are unavoidably abused, and being from their nature inquisitorial, and invasive of the sanctity of homes, have proved a source of complaint from their first introduction. There is, however, a collateral benefit which arises from this tax, namely, that it is frequently the means of preserving exciseable drinks and provisions from noxious adulteration. Excises were first introduced in England in 1643, on the motion in the Commons of Mr Pymme, although, only the year before, the Commons had declared that the rumours of their intention to introduce an excise were malignant and wholly unfounded, and that their scandalous authors should be apprehended, and brought to condign punishment. This tax was originally a war measure, growing out of the existing civil commotions, and designed to be temporary. It was at first imposed on only a few articles; these have been continually added to, so that now the excise duties are not only a permanent tax,

but constitute one of the most abundant sources of the royal revenue.

10. TAX. This word is *nomen collectivum*, but is yet of comparatively modern use. It is derived from the Greek Ταξις, *order* or *command*. The tax, properly so called, came in lieu of the various methods of levying revenue, so that we now hear no more of scutage, hidage, subsidy, tenths, fifteenths &c. since all have given place to the system of taxation. The imposition of taxes is a branch of the legislative power, and was exercised, though in a very limited degree, by the Saxons in their Wittenagemote, and subsequently by the Anglo-Norman parliaments. On the full establishment of the feudal system in England, the crown was almost entirely sustained by revenues derived from its demesnes, and such occasional supplies as were furnished in the modes already stated. The few taxes levied in England in those times, were generally demanded by the king at his pleasure, until Edward I. obligated himself and his successors to levy no tax but by the consent of the realm.

It would be inconsistent with my general design to enter into a minute explanation of the various species of tax known to the history of English legislation. They are divided, as we shall see more particularly hereafter, into two great classes, viz. Perpetual and Annual. The former embrace the customs, the excise duty, the stamp duties, postages, the duty on salt, the duties on houses and windows, on coaches, offices, pensions &c. The latter comprehend the land tax and the malt tax; all of which will be briefly remarked on presently. Customs, commonly called duties, are a tax paid by the merchant on goods imported or exported by him, though the term is more generally applied to the former. These duties come under the head of indirect taxes, because they are not upon things possessed and retained, but on such as are for consumption or sale, and

hence are, in truth, paid by the consumer and not by the merchant. Such customs, imposts or duties are scarcely felt by the people, who generally confound them with the price of the commodities, and are thus unconscious of the fact of taxation; whereas direct taxation, though infinitely smaller in amount, has been universally unpopular, and sometimes odious with the people. Where the consumer is made directly acquainted with the tax, as is more the case with excises of every description, the people have always been found very unfriendly to it.

Having explained very briefly most of the terms connected with the subject of the royal revenues, we have now to recur to the feudal times, and take a hasty survey of some of the sources of the royal revenues, from the period of the Conquest; of the changes consequent on the alienation of the crown or demesne lands; and of the gradual decline of the feudal incidents and services.

The revenue of the Norman kings was sufficiently ample, from the extent of the crown lands, from their arbitrary imposition of various burthens, and from the profits arising from the numerous fruits of tenure. The alienation of the demesne lands was however, from various causes, both rapid and wasteful; and the interposition of several laws restrictive of their alienation, came too late to subserve any valuable purpose. The expedient of arbitrary impositions, under the name of loans, benevolences, purveyance &c. to which the necessity of the kings forced them to resort, was not suitable to the less tumultuary times which succeeded, and to the more settled notions of property, and was consequently resisted and destroyed, step by step, in the subsequent periods of the monarchy. The feudal incidents shared the same fate. The people, by their more improved condition and habits, and by changing their military into civil feuds; and the judges, by an interpretation suited to the spirit of the times; concurred to modify the

severity, and to restrain the limits of the feudal tenures. The incidental operation, also, of several circumstances, such as the payment of fixed money rents, instead of the performance of personal services, which money rents became continually less in proportion to the greatly increasing value of estates, diminished very sensibly the amount of the perquisites of the feudal lords, and of the revenues of the crown. The abolition of the court of Wards and Liveries after the Restoration, and the conversion of military into soccage tenures, which soon followed, put a final end to the intolerable grievances of a system which had oppressed England for several centuries. The sources of royal revenue being now greatly impaired, it became necessary to provide in their stead a more certain and determinate income. The land-tax, in its modern shape, took place of those methods of rating property, and persons in respect of their property, of which I have just spoken. It has been stated that the assessment on which the subsidies were founded, being made according to an ancient valuation of lands, a subsidy in the time of queen Elizabeth fell as low as seventy thousand pounds; while a modern land-tax yields something more than two millions. From various causes a subsidy, in succeeding reigns, yielded still less, and went on continually decreasing. Thus, a man was taxed only in his own county or shire, though he had an estate in others, of which only loose estimates would be made, the favour running naturally against the crown; losses in the value of estates were exaggerated, and improvements carefully concealed; and while the small proprietors went to decay, the large did not increase the amount of their subsidy.

On the commencement of the civil wars between Charles and his parliament, the latter, in order to raise a revenue, introduced the practice of laying weekly and monthly assessments of a specific sum on the counties, levying them both on lands and personal estates. And after the Restora-

tion, the monthly assessments being now established by custom, producing a more certain revenue, and being raised by commissioners named by parliament, the subsidies, in turn, fell into total disuse, and assessments were granted as the national emergencies required. Hence we see the incorrectness of the popular opinion that the land-tax was first introduced in the reign of William III. as all the imposts we have mentioned, except the tenths and fifteenths, were land-taxes. In William's reign, however, a new assessment of estates took place, according to which a supply of five hundred thousand pounds was equal to one shilling in the pound of the value of estates then given in. The method of raising it was by charging a particular sum on each county, assessed on individuals according to both their real and personal estates. This substitution of a tax on the people in lieu of the revenue of demesne lands, and the fruits of tenancies *in capite*, was eminently calculated to diminish the arbitrary power of the sovereign. Yet the first effects of this dependence of the king on the representatives of the nation for a supply, were happy neither for him nor his subjects; the former being too frequently driven by the dilapidation of the royal estates, and the diminution of the feudal fruits, to adopt those irregular methods of supply which had now become odious; and the latter, while they resisted these arbitrary exactions, being with difficulty brought to understand that the real exigencies of the crown were their own. Hence those everlasting disputes respecting subsidies and exactions which embroiled the kings with their parliaments; and much apology is certainly to be made for the unhappy race of Stuart, who, between their poverty and their attachment to an ancient prerogative, became the victims of the new born independence of the times. The last time that taxes were levied by way of subsidy, was when the Commons voted

to Charles II. four subsidies, to relieve him from the precarious state of his revenue.

The royal revenues embrace, or formerly embraced, a variety of other perquisites besides those we have mentioned; and as the abolition of the feudal tenures after the Restoration, rendered it necessary to remodel the revenue system, it may be useful to present the student with a general view of the subject, which we shall endeavour to render as brief as possible.

The entire revenues of England are divided into two great classes, Ordinary and Extraordinary. The former is subdivided into Ecclesiastical and Temporal; and the latter into Annual and Perpetual.

The Ordinary *Ecclesiastical* revenue may arise,

1. From the custody of the vacant temporalities of archbishops and bishops. The king, in legal contemplation, being the founder of all the bishoprics in the kingdom, they revert to him on becoming vacant, and also that they may be preserved until a successor is appointed. The mesne profits, however, belong to the crown, without any account of them to the successor. Some of the kings were in the habit of keeping the sees vacant, that they might enjoy the temporalities, and commit destructive waste. They sometimes even refused to restore them unless purchased at a very onerous price; and with these views, queen Elizabeth kept the see of Ely vacant nearly twenty years. This source of revenue is at present nearly nominal.

2. Corodies appertaining to every bishopric, were anciently another source of ecclesiastical income. This is a right possessed by the king of sending one of his chaplains to be maintained by a bishop, or of having a pension allowed him, until the bishop promotes the chaplain to a benefice. This, also, has gone into total disuse.

3. Extra-parochial tithes. In such places as are not within the limits of any parish, as forests, the king is en-

titled to all tithes, he not being a mere layman, but *persona mixta*.

4. The first fruits and tenths of all spiritual preferments vest in the king, as the spiritual head of the church. These are now vested in perpetual trustees, by statute 2 Anne, so as to constitute a fund for the augmentation of poor livings, and are known by the name of Queen Anne's Bounty.

The Ordinary *Temporal* revenue arises,

1. From the profits of the king's demesne lands, as has been previously stated.

2. From the hereditary excise granted by parliament to Charles II. his heirs and successors, in lieu of the profits of feudal tenures, and the right of purveyance and pre-emption; all of which were abolished in that reign. Purveyance and pre-emption consisted in the prerogative right of purchasing through the king's purveyors, any thing they might require for his household, at an appraised valuation, in preference to all others, and even against the consent of the owners; and also of impressing the subjects' horses, carriages &c. to carry on the king's business, at such prices as the purveyors should affix.

3. Profits arising from licences granted by the crown to retail wines. These, in addition to the hereditary excise just mentioned, were settled on Charles II. in compensation of the feudal and other revenues of which he had been deprived. They were abolished, however, by statute 30 George II. c. 19, and in lieu thereof, parliament granted an annual sum of seven thousand pounds, issuing out of the new stamp duties on wine-licences.

4. Profits arising from the royal forests, by amercement to be imposed by the Forest Courts for violations of the game laws. This source of revenue is now almost wholly unknown.

5. Profits accruing from the courts of justice. They consist of fines imposed on offenders against the criminal laws of the country; sums forfeited under recognizances; amercements levied on defaulters; fees of various kinds on the issuing of legal process, affixing seals &c. Most of these are now granted out to subjects, or appropriated to defined uses, so that few of them come into the royal treasury.

6. Royal fish, consisting of whales and sturgeon, which, if cast on British shores, or caught in their vicinity, belong to the crown. This prerogative is said to have arisen as a compensation to the king for the protection given by him to the seas against pirates; and also that the queen's wardrobe may be supplied with whalebone!

7. Wrecks were also at one time a source of revenue. If a vessel were wrecked, or lost at sea, and any of the cargo came to land, it belonged to the king, for the reason first assigned for vesting in him the royal fish. Henry I. ordained that it should not be considered wreck where any person escaped alive from the vessel. Henry II. extended this to the escape of any living creature, provided the goods were claimed within three months. Richard I. went still further, and made it no wreck if the owner were shipwrecked and escaped; if he perished, his children, brothers or sisters should have all; but in default of such relatives, it vested in the king. This humane feeling was again further expanded in the reign of Henry III. who provided that it should not be wreck whenever the goods could be identified. By the statute 3 Edward I. the time for reclaiming the goods allowed by Henry II. was extended to a year and a day; but it enacted that if any man, dog or cat escaped, it should be no wreck. This statute threw the law of this subject into temporary confusion; but the courts decided, first, that the animals mentioned were merely named by way of example; and finally, that

if the goods could be identified in any way, they were not wreck; so that the law was restored to the condition in which it was prior to the statute of Edward. At this time, the goods, if not of a perishable nature, must be kept by the sheriff of the county for a year and a day, and if not then reclaimed, vest in the king. If they are perishable, the sheriff must sell them, and the proceeds will, in like manner, be refunded to the owner, or pass into the royal exchequer.

8. Royal mines. All gold and silver mines discovered within the kingdom belong to the crown, as it alone possesses the power of coinage, and should therefore be furnished with the materials. If mines of other metals be discovered, but with the precious metals present in them, they are not royal mines; but the king is entitled to the gold and silver taken from them, on paying for them as base metal, this being the only object for which the mines can be legitimately wrought.

9. Treasure-trove. This consists of gold, silver, plate or bullion found hidden in the earth or other private places, the owner being unknown, and not subsequently ascertained. These belong to the king. In England, as well as in feudal countries generally, death was the penalty of concealing treasure-trove from the king; but it is now punished only by fine and imprisonment.

10. Waifs. If goods are stolen and waived, or cast away, by the thief in his flight, they vest in the king, as a punishment of the owner for not making fresh pursuit after the thief. If the goods are taken by the owner before a seizure is made for the king's use, though at any period after the theft, they return to the owner, and cannot be made waifs. The goods of foreign merchants never became waifs.

11. Estrays. These consist of certain valuable animals which have strayed from their owner, who remains un-

known. They vest in the king, after compliance with certain means for ascertaining the owner. This prerogative has generally been granted by the crown as a franchise to the lords of manors.

12. Forfeitures. The laws of England, from the earliest times, have attached to the commission of certain crimes a total forfeiture of personal property, and a temporary, and sometimes absolute confiscation of lands. All property is the creature of positive law, and when a member of society violates its fundamental regulations, and shows himself no longer worthy of protection to himself and property, his possessions revert to the common stock, unless express provision to the contrary is made in behalf of his relatives, as is the case in some countries. In England they vest in the king, in whom the dignity and sovereignty of the nation are supposed chiefly to reside. At one period forfeitures were a prolific source of revenue to the crown. But the severity of penal jurisprudence has been greatly mitigated as religion, knowledge, and the true theory of government came to be better understood, and more generally diffused.

13. Deodands. This is a forfeiture of certain personal things, not as a direct punishment for crime, but rather as a means of rendering persons more cautious of human life. If any personal thing happened to be the immediate instrument of the death of any one, it became forfeited to the king, under the name of deodand, because it was to be applied by the king's almoner to pious uses. It is usual at the present day for the jury who pass on the case, to confiscate, if practicable, some very inconsiderable part of the thing which occasioned the death; as a wheel instead of the entire carriage. Deodands have not been unknown to the jurisprudence of this country. They were abolished in Maryland only as late as the year 1809.

14. Escheats. In legal contemplation, all the lands in England are derived from the crown. If, therefore, any one dies leaving no legal heirs, his real estate reverts to, and vests in the king.

15. The last source of the king's ordinary temporal revenue is his custody of the estates of idiots, which is vested in him as the *magnus parens patriæ*.

The king, from a very early period, had the wardship of the lands of such persons, and after suitably maintaining them, appropriated the surplus revenue to his own use. This prerogative formerly belonged to the lord of the fee; but the king obtained it sometime prior to the statute 17 Edward II. c. 9, as that statute was certainly in affirmance of the then common law.*

The various sources of ordinary ecclesiastical and temporal revenue which we have enumerated, having in time become unproductive, or at least inadequate to the support of government, it became necessary to resort to other means, and these constitute what is called the Extraordinary revenue. This consists of various species of tax imposed by the Commons, who in parliament usually resolve themselves into a committee of ways and means, to deliberate on a scheme of taxation, generally proposed to them by the Chancellor of the Exchequer.

These taxes are either Annual or Perpetual. The Annual extraordinary revenue chiefly consists of the land-tax and the malt-tax. The former has been mentioned as having superseded hidage, talliage, subsidy &c. It is raised by charging on each county a specific sum, according to a valuation given in 1692, and this sum is apportioned by commissioners, and charged on individuals owning lands; for the payment of which their personal as well as real estate is liable. By the recent statutes 38 and 42 George III. the land-tax has been made perpetual.

* 4 Coke's Reports, 126.

The malt-tax, which originated in 1697, remains annual, and is an excise, not only on malt, which gives name to the tax, but on various liquors the consumption of which would much interfere with the use of malt. This tax generally raises the nett sum of about six hundred thousand pounds.

The Perpetual extraordinary revenues are various, and consist,

1. Of Customs. These are duties imposed on imports and exports, and have been explained as far as our limits will admit. Some small ones, however, have not been mentioned. These are *first*, the Alien's duty, a petty custom of threepence in the pound, paid by aliens for all commodities exported or imported by them, and which are in addition to the ordinary customs of the realm. This duty, however, the legislature had the good sense to repeal by statute 24 George III. except as to the city of London, in which a small duty, called scavage, is still exacted on the goods of aliens. *Secondly*, Prisage or Butlerage on wines. This consisted of the right of taking two tons of wine from every English or foreign vessel which imported twenty or more tons of wine. It was commuted by Edward I. for two shillings duty on every ton imported by aliens; and this took the name of butlerage, because it was paid to the king's butler. *Thirdly*, Subsidy. This was a small duty imposed by parliament on the three staple commodities, wool, woollens and leather, in addition to the regular customs, which were called *costuma antiqua et magna*, in contradistinction to these various petty customs, which took the name of *costuma parva et nova*. *Fourthly*. Tonnage was the regular duty on all wines imported, payable after a certain rate for every ton, and was exclusive of the prisage or butlerage. *Fifthly*. Poundage was an *ad valorem* duty of a shilling in the pound on all merchandise whatever. Tonnage and pound-

age were usually granted by parliament to the king at the same time, and took the name of the *Súbsidy* of tonnage and poundage. These minute distinctions are at the present day but little regarded by any but the officers of the customs, the general result being embraced under the comprehensive term, customs.

2. Excise on things consumed, or on the retail sale thereof, is the next great division of the perpetual extraordinary revenue, and has been already sufficiently explained.*

3. Duty on Salt. This is an excise of three shillings and four pence imposed on every bushel of salt by various statutes, commencing with those that were passed in the reign of William III. It is not usual to class this duty with the excises; but this appears to be merely because it is not under the direction of the usual excise commissioners. This tax was temporary until the statute 26 George II. c. 3, made it perpetual.

4. Postage, or the duty imposed for the carriage of letters, also belongs to this head of perpetual extraordinary revenue, and was fully established in the year 1654. This has been found at all times a very popular species of tax, and has likewise proved a very productive one.

5. Stamp duties. These are taxes imposed on various written and printed instruments, whether of a legal or merely private nature; so that parchment and paper for these purposes must be stamped, and cannot be obtained or used unless the tax be paid at the same time. Mercantile instruments of nearly every description; legal proceedings of most kinds; almanacks, newspapers, pamphlets of less than six sheets; wine-licences, &c. require to be stamped; the tax to be paid, varies in amount from a penny to ten pounds. This duty was first imposed in the reign of Wil-

* Vide *supra*, 568, 575.

liam and Mary, and has continued ever since to be a profitable but rather unpopular tax.

6. House-tax. This tax, in one form or other, is of great antiquity. It is mentioned in Domesday Book under the name of *fumage*, it being a small sum due by custom to the king for every chimney in a house. This was made in the reign of Charles II. a legal and perpetual tax of two shillings on every hearth. This hearth money becoming very unpopular, it was abolished by statute 1 William and Mary, but was revived under a new name, by statute 7 William III. by a tax on all houses except cottages. Its amount has greatly fluctuated; but by statute 48 George III. it ranges from one shilling and sixpence to two shillings and ten pence in the pound of the yearly rent or value, from five to forty pounds and upwards. This has been somewhat reduced by the late statute 4 George IV.

7. The window-tax was first imposed by statute 7 William III. c. 18, and was only where the windows exceeded nine in each house. By statute 48 George III. c. 55, the amount of tax ranges from six shillings and sixpence to ninety-three pounds, two shillings and sixpence, in proportion to the number of windows from six to one hundred and eighty; and every window exceeding that number pays the additional sum of three pounds.

8. Tax on male servants. This was first imposed by statute 17 George III. and embraces nearly every male servant except those employed in trade, manufactures and husbandry. By statute 48 George III. the minimum, or tax for one servant, is two pounds four shillings, and for eleven and upwards, seven pounds one shilling. Bachelors pay the additional sum of one pound fourteen shillings for each male servant. These rates were considerably reduced by statute 4 George IV. c. 11.

9. Hackney-coach-licences. This tax commenced in 1654, and has continued ever since. It produces annually about twenty-six thousand pounds.

10. Offices and Pensions. This is a tax of one shilling in the pound on all salaries, fees and pensions which exceed a hundred pounds *per annum*. It was introduced by statute 31 George II. and has always been a very popular tax.

Formerly all these taxes were funded separately for the payment of monies loaned to government on their respective credit. This being found inconvenient, as the taxes were continually increasing in number, they were at length all united into three distinct funds, and pledged in like manner, with the superadded faith of parliament. These three funds, namely, the Aggregate, General, and South-Sea Funds, discharge, in the first instance, all interest and annuities which were formerly charged on each distinct fund; and the surplus is then consolidated, and constitutes what is called the Sinking Fund, because intended gradually to diminish or sink the national debt, which, from the time of William III. to our own day, has increased from about fourteen millions to the rather alarming amount of nearly one thousand millions sterling!

The foregoing somewhat hasty account of the royal revenues, from the Conquest to the present day, will perhaps sufficiently contrast the servile, precarious and extorted revenues of feudal times, with the voluntary, secured and liberal resources of a free and powerful government; which, though it has waged continual wars, and on a scale infinitely more extended than was known in the feudal ages, has nevertheless fostered agriculture, commerce and manufactures, whilst the most liberal protection has been given to religion and knowledge. The nation has sometimes supplied the government for its annual disbursements with not less than one hundred and twenty millions, a sum which perhaps the rest of Europe would have been scarcely able to supply. It is now time, however, that we should part with this subject, and pursue the remaining topics of the lecture.

(7.) Of the Rise of the English Com-
mons. At the close of the preceding division of our subject, I intimated that the dilapidation of the royal estates, and the diminution of the feudal fruits, induced the adoption of various arbitrary exactions, which, in the time of the Stuarts, tended greatly to embroil the kings with their parliaments, and finally terminated in the decapitation of Charles I. and the abdication of James II.

No point of English history has so excited the prejudices and discussions of party, as the character of the administration of these princes. The Whig party consider them as usurpers on the liberties of their people; the Tory, as only exercising their ancient prerogatives, in times no longer fitted for their exercise. To the latter conclusion we own we have always leaned, since it must be confessed that something is to be allowed for the force of monarchical education, kings being generally taught to value as their own the rights and prerogatives of their predecessors. The controversy were less interesting to us at this day, had it not involved the question of the ancient freedom of the English constitution, and the antiquity of the House of Commons. Every one will form his own judgment on these questions, in his study of English history; but I cannot forbear a few remarks on the genius of the English government in the earlier times, as connected with the subject of our inquiry.

Whatever equality the invaders of the Roman empire might have brought with them from their forests, it is apparent that it could not long exist in the new situation in which they found themselves. Equality is easily preserved where the nation is small and indigent, and as certainly disappears in opposite circumstances. The whole history of the feudal kingdoms proves the extreme inequality of condition that prevailed; and the low estate of the commons at that time is so visible at every turn, that only the most

fanciful theorist could imagine them to possess any weight or consideration in the state. Causes which readily suggest themselves, rendered this eminently the case under the Norman kings; nor can we find that under the Saxon government, circumstances were much more auspicious to the body of the *péople*. Whatever obstructions the royal power found to its tyrannical exercise, were opposed by its turbulent aristocracy; for this all the privileges, all the charters, all the limitations of prerogative were created; and during all these struggles, the people, properly so called, were effectually out of view, because they formed no part of the political state. Even when provision was made against the tyrannical oppression of the king, the very phrase shows the contemptibleness of the commons. '*Nul-lus liber homo,*' says Magna Charta; a phrase so far from applying to the commons of England, or exhibiting any care for their rights, that it in fact concerned that class only which stood in contradistinction to the commonalty; *liber homo* meaning any thing but those indigent and inconsiderable individuals from whom the English commons were afterwards to arise. It is true, indeed, that every subject of England at this day, appropriates to himself the benign enactments of the charters and limitations of prerogative alluded to, and that Magna Charta is now a panoply to all; but we must look for the origin of this in times and causes much nearer our own day. It is so far unnecessary to demonstrate this, that we cannot rationally come to any other conclusion. It is certain that in France the popular assemblies fell speedily into disuse, from their unwieldly numerousness, and consequent unfitness for business. It is equally certain that the Saxon Wittenagemote, which nominally consisted of all the principal landholders, was ill attended. It is, we think, a mistake of the party champions who have approached this question, to imagine that the privilege of attending these assemblies was duly esti-

mated, and eagerly used. The truth is that it was regarded as a burden, not as a privilege, and the business fell naturally into those hands which larger interests and comparative intelligence rendered fitter for it; and both in England and France, the smaller landholders, after diminishing greatly in number and importance, and finally being almost swallowed up, at length disappeared wholly from these parliamentary assemblies. The Norman conquest, moreover, had the necessary effect to confine the king's counsellors, (so the parliament was called) to a small number, and those chiefly the great barons. William's subjects were, on the one side, a conquered people; on the other, an invading and, in great part, a mercenary army, altogether dependent on the leader whom they had followed both for honour and gain; circumstances little auspicious to a free government, and a popular parliament. We would desire any one who reads the history of those times with the least impartiality, to point out, if he can, on what occasions, whether small or momentous, the commons exercised any influence, or even raised their voice in the parliaments. The soccage tenants were not considered as holding by an honorable tenure; the burghers, who were artificers and merchants, were perhaps still less regarded. The only proper constituent members of the parliament were the military tenants, that is, the tenants *in capite* of knight's fees, of whom the whole number, for some time after the Conquest, might be about seven hundred, and who, together with the bishops and abbots, sat in one body. The introduction of the representatives of the commons into the parliament took place some ages after this period. It was a measure prompted, as well by the pecuniary necessities of the monarch, as by the increasing importance of the commons; and this representation had then become as natural, and indeed unavoidable, as in earlier times it would have been preposterous, and uncongenial to the

strict feudal spirit. In fact, it is apparent that only the great landholders were originally members of the national council; and as the sub-tenants were the *pares* in their lord's courts, so the lords themselves were the *pares* in the king's courts and council; and to have introduced the lower vassals of any sort into the latter, would have been as extraordinary a departure from feudal subordination, as that one lord should have been vassal to another, and confounded himself with the peasants and artificers who sat in the petty manorial assemblies.

The present constitution of the High Court of Parliament, as also its legislative powers, have, therefore, been the growth of time and circumstances. Originally an aristocratic assembly, seldom convened but to settle some dispute with the sovereign, who was himself little more than a great baron; it has taken its present shape and order from the various mutations in the power and wealth of the respective classes of the state. Yet it may be admitted to have been all along composed of those whose liberties and property were actually concerned; in early times, of the barons, who engrossed all that then existed of both; in later days, of those who have gradually come to have a share in these, and finally to possess them in an equal degree. To heap excessive obloquy, therefore, on the unfortunate Stuarts, who deemed themselves to be exercising only their long established and unquestionable prerogatives, and who thought they were resisting innovations, when they opposed the new born spirit of the times, betrays some share either of injustice or of ignorance. They had the personal misfortune to reign in times when the unfitness of the ancient system began to display itself, and when men's minds received eagerly the principles of free and limited government; and not having the policy, or, we may allow, the capacity to understand and yield to the

growing improvement, fell, as has not seldom happened in revolutions, the victims of false but honest prejudices.

(8.) Of the Modern English Tenures. The severity of the feudal system in England had been considerably mitigated even prior to the statute 12 Charles II. to which I have several times alluded. The age of chivalry and the crusades had gone by, and the romance of military renown no longer retained its former attractions. The people, becoming more settled in their habits, preferred the peaceful occupations of agriculture and commerce; and not only acquired thereby large additions to their physical comfort, but greatly changed their intellectual condition. This change in habits produced a correspondent alteration in their feelings and manners, and seemed to demand a like change in their laws and institutions. This was effected in a considerable degree by the statute of Charles II. which abolished the more obnoxious tenures, and most of the feudal incidents, which had rendered the system so justly odious. The student, nevertheless, must not suppose that the scheme of feudal holding was abolished; or even, if the statute had so expressly ordained it, that the numerous feudal principles incorporated with the general jurisprudence of the country, through a series of nearly six centuries, could have been thereby severed from the existing laws and institutions. Neither of these objects, however, was contemplated by that statute. Some feudal tenures, and many of their incidents, still remain; and to these we are to add nearly the whole of those principles to which the feudal laws and institutions had given rise, and which at this day form so large a portion of that extensive branch of legal learning which concerns landed property. These considerations should strongly weigh with students, to urge them to a diligent examination of the system which we have partly considered.

The progress of liberal principles during the time of the civil war and the commonwealth, prepared the publick mind for the entire removal of the onerous incidents of the military feudal tenures. These were consequently abolished at the Restoration, by the above named statute of Charles, which enacted that the court of wards and liveries, and all wardships, liveries, primer-seisins and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, be wholly taken away; and that all fines for alienations, tenures by homage, knight's service and escuage, and also aids for marrying the daughter, or knight-ing the son, and all tenures of the king *in capite*, be likewise taken away: that all sorts of tenures held of the king or others, be turned into free and common soccage, save only tenures in frankalmoigne, copyholds, and the honorary services of grand serjeantry; and that all tenures which should be created by the king, his heirs or successors in future, should be in free and common soccage.

The following are the tenures known to the jurisprudence of England since the passage of this statute. 1. Free and common soccage. 2. Petit serjeantry. 3. Honorary services of grand serjeantry. 4. Burgage tenure. 5. Ancient demesne. 6. Gavelkind. 7. Copyholds, of two species. 8. Frankalmoigne. 9. Tenure by divine service. They are divided into lay and spiritual; free and base. All the lay tenures are either by free and certain services, embracing common soccage, grand and petit serjeantry, burgage, ancient demesne and gavelkind; or by base services, as by copy of court roll, which is a holding either 'at the will of the lord,' or 'according to the custom of manor.' Certainty of services is essential, and is the great criterion which distinguishes all soccage tenures. In all these cases the services are certain; but in copyholds they are said not to be free or honorable; whereas in all the other cases the services are free as well as certain.

The spiritual tenures are also of two kinds, viz. by frankalmoigne, and divine service. Both are free or honorable; but the former is certain, the latter uncertain in its services. Frankalmoigne consists in the duty of the tenants, as, for example, any religious corporation, to perform various pious exercises, as prayers, masses &c. for the souls of the grantor of the land and his heirs. This was the tenure by which nearly all the monastic institutions, and other religious corporations, held their lands. To this tenure no fealty was incident; indeed this could not be expected, as it is not a *feudal* tenure, properly so called, and its exalted nature would also entitle it to be excepted from the obligation of fealty. Tenure by divine service required some special or certain spiritual service; as to say five masses annually; to distribute twenty pounds *per annum* in alms, &c. It is said that frankalmoigne is an ancient Saxon tenure; and, even to the present day, the person of whom the lands are held, cannot enforce the performance of the tenant's duties by any of the modes known to the feudal law. There is no other remedy than by complaint to the Ordinary to have it corrected; distress, forfeiture &c. being wholly inapplicable to this tenure. With this exception, all the tenures are evidently feudal, and are derived from the same source as knight's service.

I have had occasion to allude to the fact, that numerous feudal principles remain in full operation in England, though the causes in which they originated have long since ceased to exist. It would be of little use to present to the student a digest of these principles, as many of them would perhaps be wholly unintelligible to him at this point of his studies. It is sufficient to assure him that most of the rules which regulate the descent of lands, and the limitation and conveyance of such property, by deed or otherwise, and many others, are either wholly of feudal origin, or are the means contrived to get rid of the strict application of

feudal principles. This will be made sufficiently obvious when we come, in the Second Title of these Outlines, to analyze the learning of the Real Law.*

(9.) Influence of We are, lastly, to make a few remarks feudal law on Ame- on the utility of feudal learning to the rican Jurisprudence. American jurisprudent, and the influence of feudalism on the system of law generally known and practised in these states.

Any one who has attentively studied the history of English jurisprudence, particularly that portion of it which relates to landed estates, cannot have failed to remark, as we have just said, how much it has been fashioned either by the feudalism which was once so prevalent, or by the struggles of the courts, and occasionally of the parliaments, to modify its rigours and stubborn technicalities. The reciprocal relation of lord and tenant; the tenacity of the former in maintaining the fruits of tenure, and enforcing every feudal obligation; and the artifices of the latter in endeavouring to soften or elude them; gave rise to a numerous train of legal doctrines which either remain to the present day in their integrity, or, although modified, greatly affect the general system, and can never perhaps be entirely effaced from it. Feudality, indeed, lies at the very foundation of the municipal or common law; and whatever may be done by positive enactments, or even by judicial legislation, to remodel the system, and expunge its feudal lineaments, its heterogeneous origin, as well as its feudal affinities and alliances, will still continue to manifest themselves. In this country, the common law is the basis of our jurisprudence; and this, too, with comparatively slight variations, or inconsiderable modifications of the original.

* I beg leave to refer the student to Hoffman's Course of Legal Study, 79, Note 1, where some of these feudal principles are mentioned, and the utility of feudal learning is briefly vindicated.

If the laws and customs of most of the states have abolished many of the more obvious principles and rules which are of feudal parentage, those which remain are still very numerous; and nothing less than a laconic enactment, which shall annul the entire system, and supply its place with a new code, could supersede the necessity of resorting to a degree of feudal learning, for the due comprehension of what of feudalism might remain in our jurisprudence. Much of the nomenclature, the technicalities and the refinements of the common law, is confessedly of feudal origin; and in very many instances, which could be easily mentioned, the courts of this country, in common with those of England, illustrate their reasonings by continual reference to the doctrines of feudal times, notwithstanding that the causes which created them are no longer in practical operation in England, and never were so in this country. These doctrines, in fact, have become rules of property; they give rise to others; and occasionally suffer modification themselves; all which shows the necessity of an acquaintance with the fount whence they sprung, and with the particular reasons in which they respectively originated. The *Assurances* of property in the United States, and their various limitations, are essentially the same as in England, and dependent, as they are there, on feudal principles. So, also, the feudal *Actions* for the recovery of lands, are, to say the least, as much used in this country as in that from which we sprung. Though our canons of *Descent* have been considerably changed, there are still visible in them some traces of their feudal origin; and even were this not the case, there would be a great necessity of thoroughly comprehending the rules of English descent, as several important branches of the common law are intimately connected with them; so that the utility of feudal learning, as far as the law of inheritances is concerned, would be still unquestionable. The larger part also, if not

the whole, of that extraordinary system of law relating to *Remainders*, or, in other words, that law which treats of such interests in lands as are limited to arise after the expiration of some preceding estate, is of feudal origin, and is as much the law of this country as of England. And though such limitations are not quite as usual, and are by no means as complicated with us, yet they are daily becoming more intricate, and in time will be equally common, since great individual wealth, which will soon appear among us, cannot fail to originate the same voluminous family and other settlements, and nearly all that complicated machinery, which the pride of aristocracy, or the tenacity of avarice, deemed requisite in the mother country. The law of *Tenures*, also, is nearly as important to be understood by the American as the British lawyer; for though in both countries the feudal tie is nearly nominal, the same feudal principles affect the law of landed estates in each, and are nearly as operative at the present day, as they were in the height of feudalism in England. We know, for example, that the fictions and presumptions of law are attended by precisely the same consequences, and are just as operative, as if the matters assumed in them were realities. The same remark applies to certain legal theories of the feudal times; as, for example, that which annexes tenure as an almost essential ingredient in the idea of landed property. In some of the states of the Union, the legal notion of tenure still obtains; many of our holdings are in free and common socage; and if by the theory of English law all the lands of that country are of the gift or grant of the crown, the same idea prevails here; for in perhaps most of the states, every proprietor is considered as holding either mediately or immediately of the state in which the lands lie.*

* 3 Johnson's New York Reports.

By the charter of Maryland the Lord Baron of Baltimore and his heirs were authorized to create manors, with courts-baron, and all things appertaining to them, with views of frank-pledge &c.* The Province itself was a great fief or honour, held of the crown by the tenure of free and common soccage, and the power of sub-infuedation was expressly conferred, maugre the statutes of *Quia emptores terrarum*, and *De prerogativâ regis*. The State, after the Revolution was consummated, succeeded to all the rights of the lord proprietor; but there was nothing in that revolution which *per se* abolished tenure, and relieved our citizens from the obligations of fealty, and whatever feudal services had been reserved: nor could the abolition of the Quit-Rents due to the heirs of the lord proprietor, necessarily have that effect.† I am not aware of any legislative act of this state which has abolished tenure, and converted our holdings into pure *allodium*. The legal obligation of fealty, therefore, may possibly remain, though it is certainly dormant, and not probable to be revived. In the state of Connecticut, however, these doubts, as well as many others in regard to feudal doctrines, were intended to be effectually removed by express legislation, but, in regard to tenures, perhaps not with entire success. The charter of that colony created a tenure of the crown, and the General Assembly, in 1692, ordained that their grants of lands should be held in soccage. By the act of 1793, it was enacted that every proprietor of lands in fee simple should hold the same absolutely, and in pure *allodium*.‡ But whether that act designed only to declare that all lands holden of the king by soccage tenure, should be vested in their respective proprietors in absolute dominion, is not very clear. Such an enactment, indeed,

* Charter of Maryland, sec. v. xviii. xix.

† Act of Assembly 1780, chap. xxiv

‡ Laws of Connecticut, title xcvi. chap. i. ii.

would have been perhaps unnecessary. Nor does the act seem to embrace estates tail, for life, or for years, even if construed to extend to holdings from individuals. If, therefore, tenures in tail, for life, or years ever existed there, it does not appear from any statute of that state within my knowledge, that such tenures are abolished. In the state of New York, all lands granted since the Revolution are holden in pure *allodium* only; but such as were granted prior to that period, are held by the tenure of free and common socage.* And the act just cited expressly repudiates the idea that these socage lands are to be held exempted from the rents, services and fealty reserved to the grantors. The quit-rents due to the king were not abolished, but transferred to the state; they have, however, been in various ways nearly extinguished. It would also appear that fealty, though expressly reserved by the statute of 1787, has been very recently held to be due in theory only.† It would be a little difficult, perhaps, to relieve such a decision from the imputation of judicial legislation, however absurd the reservation of the act of 1787 may have been. In the state of Virginia, the common law, and all general statutes of England prior to the fourth year of James I. are declared the rule of decision in that state until repealed or modified; and all quit-rents &c. due to the king, are vested in the Commonwealth.‡ By the act of 1777, ch. 2, sec. 9, it is provided, that in order that lands may not be granted on, or be subjected to any feudal tenure, quit-rents shall be abolished. Notwithstanding this act, and that of 1785, ch. 60, which abolished the right of primogeniture, and all preference of males over females in the inheritance of estates, Mr Tucker, the learned editor of the 'Commentaries,' remarks that subsequent legislatures

* Act of New York, 1787.

† 2 Cowen's N York Reports, 652. *Cornell v. Lamb.*

‡ Act of Virginia, May 1776, chap. v. sec. 6, 7.

have manifested a strong disposition to revive some of the maxims of the feudal system. This, no doubt, has been the case; but independently of the enactments which may have resulted from the disposition just mentioned, there can be as little doubt that perhaps many hundred feudal principles might be enumerated as operative at all times in that state; and the same remark applies to nearly all the states of the Union, as will be abundantly shown in the ensuing volumes.

We have now finished our inquiries into the origin and progress of feudalism. It has not only left on the municipal jurisprudence of every country in which it existed, some deep and visible impressions, but has imparted to the great system of European international law some features which no times nor circumstances will perhaps ever eradicate. These will be adverted to under the Seventh title of these Outlines, which treats of the 'Law of Nations.'

APPENDIX I.

SYLLABUS

**OF THE CONTENTS OF THE FOREGOING LECTURES,
COMPREHENDING TITLE THE FIRST.**

LECTURE I.

OF THE ORIGIN AND NATURE OF MAN, HIS PHYSICAL AND MORAL CONSTITUTION.

(1) OF the propriety of treating of Man's nature, prior to the consideration of the science which unfolds his rights and duties. (2) Idea of some philosophers as to the triple nature of the soul, &c. (3) Man not merely a gregarious, but a social animal; and herein of the universality of Natural Jurisprudence. (4) Man endued with reason, and progressive in knowledge. (5) Man a religious animal. (6) Man a free agent. (7) Man's actions imputable or not. (8) Society, Government, Religion and Knowledge congenial to man, and essential to his happiness. (9) What is meant by the natural equality of man; and of the nature of moral obligation.

LECTURE II.

OF MAN IN A STATE OF NATURE.

(1) Why the state of nature is treated of. (2) Its various meanings. (3) The state of nature merely theoretical and metaphysical. (4) Its metaphysical sense is its only useful one. (5) Whether the state of nature be one of war or of peace. (6) Of the inconveniencies and mischiefs of the state of nature.

LECTURE III.

OF THE RIGHTS OF NATURE.

(1) Various meanings of the word Right. (2) Division of rights. (3) In what the rights of nature consist. (4) Liberty is subject by natural law to three species of restriction.

LECTURE IV.

OF THE ORIGIN OF PRIMARY SOCIETY, AND OF CIVIL GOVERNMENT.

(1) Of Primary society, as distinguished from political or civil society. (2) Of the motives which induced men to establish civil society and government; and herein, *First*, of the theory which ascribes the origin of government to a Divine command; *Secondly*, of the theory which supposes man originally a solitary animal, and that society and government sprung from various causes, such as

1. The social principle.
2. Sense of impotency.
3. Natural hostility.

4. The urgency of our wants.
5. Sexual passion.
6. The love of knowledge.
7. Patriarchal government.

(3) History, and a knowledge of man's moral and physical nature, are more to be relied on than political systems.

LECTURE V.

OF THE RIGHT OF CIVIL GOVERNMENT.

(1) The right of civil government is either original or subsequent. (2) The original right supposed to arise 1st, from Divine command; 2dly, from the Consent of the governed. (3) Of the subsequent right of civil government; and 1st, that this, as well as the original right, is founded on consent, 2dly, of the opinions that this subsequent right rests either on

1. Possession.
2. Inheritance.
3. Prescription.
4. Ancient consent of the governed.
5. Virtues of political rulers.
6. Expediency.

LECTURE VI.

OF THE EFFECTS OF SOCIETY AND GOVERNMENT ON THE NATURAL RIGHTS OF MAN.

(1) Jurisdiction and Law the necessary result of the change from a state of nature to that of civil union. (2) Men are not reduced to a state of na-

ture by a dissolution of the government. (3) Of the effects of civil union on the right of personal security. (4) Of the effects of civil union on the right to the fruits of mental and bodily exertion. (5) Effects of civil union on the right to reputation. (6) Effects of civil union on the right to personal liberty; and herein,

1. Of Natural liberty.
2. Social liberty.
3. Civil liberty.
4. Political liberty.

LECTURE VII.

OF LAW, AND ITS GENERAL PROPERTIES.

(1) Introductory remarks. (2) Of Law in the abstract, and in the concrete. (3) Various definitions of law as a genus and species, by Demosthenes, Aristotle, Cicero, Justinian, Bracton, Finch, Grotius, Puffendorf, Saunderson, Daws, Hooker, Hobbes, Montesquieu, Burlamaqui, Barbeyrac, Dagge and Blackstone. (4) Observations on the foregoing definitions. (5) Proposed definitions. (6) Properties of law, how divided. (7) Of the internal properties of law; and herein,

1. Why law is a rule of action.
2. Of promulgation.
3. Of retrospective and ex post facto laws.
4. Of sanctions.
5. Of obligation.
6. Of permissions.

(8) Of the external properties of law.

1. These embrace the philosophy of legislation.
2. Proposed outline of a code.
3. Rules of legislation.

LECTURE VIII.

OF THE LAWS OF NATURE APPLIED TO MAN INDIVIDUALLY, WHETHER IN A STATE OF NATURE, OR OF PRIMARY SOCIETY AND CIVIL GOVERNMENT.

(1) Introductory remarks. (2) Definitions of the Law of Nature. (3) Whether the Law of Nature be common to man and brute, and how far it is common to God and man. (4) Difference between the Law of Nature and Divine Positive Law, and herein of the various theories advanced as to the mode in which man became acquainted with the laws of nature.

1. From the *Præcepta Noachidarum*.
2. From Inspiration, either of superintendency or of suggestion.
3. From Human Reason alone.
4. From Sentiment alone.
5. From Reason and Sentiment united.
6. From the Laws of Man alone.

(5) Whether the laws of nature may be derived from the consent of mankind. (6) A further examination of this doctrine; and whether the law of nature and of nations can extend to actions morally indifferent. (7) Whether Hobbes's doctrine, that

nature did not institute society but discord among men, justifies the conclusion of his critics, that society is against the design of nature. (8) Opinion of Hobbes, that the dictates of reason can be respected as *laws* only as far as God or man has enacted them as such. (9) Of the Primary and Secondary laws of nature. (10) The laws of nature relate, 1. to man's duty to himself, and 2. to his duty to his fellow creatures; and all these duties are referred either to the Absolute or Hypothetical laws of nature; and herein,

First. Of man's *duty to himself*, which consists principally in

1. The cultivation of his moral and religious nature.
2. The improvement of his intellectual faculties, by the acquisition of all useful knowledge.
3. The preservation of the health of his body and mind.
4. The honest acquisition of property.
5. The pursuit of salutary pleasures.

Secondly. Man's *duties to his fellow creatures* are

1. Such as are **ABSOLUTE**, and oblige all men, in all countries, and independently of all human laws and institutions.
2. Such as are **HYPOTHETICAL**, and arise after the establishment of society and laws; but which are nevertheless founded on the condition

of mankind considered in general, and do not flow from the mere positive law.

LECTURE IX.

OF POLITICAL, AS DISTINGUISHED FROM CIVIL LAW; AND OF THE VARIOUS FORMS OF CIVIL GOVERNMENT.

(1) Of political law, what it is, and how distinguished from civil law. Political state, how different from civil state. (2) Of the exercise of governmental power, relative or not to the constitutional and fundamental laws of a state. Of the nature and objects of a constitution, and how affected by the physical condition of the governed: And of the necessity of laws varying with the great and radical changes in the genius of a people. (3) Of the various Forms of government, and

First. Form of government defined, and how it differs from a Constitution.

Secondly. Of the influence of government on individual and national character.

Thirdly. Various divisions of the Forms of government, and herein of the divisions of

1. Plato.
2. Socrates.
3. Aristotle.
4. Polybius.
5. Charondas.
6. Zaleucus.

7. Cicero; and the opinions of some of them as to ideal forms of government.

Fourthly. Of distinguished moderns who have contributed largely to the improvement of political science, viz.

1. Machiavel.
2. Harrington.
3. Sidney.
4. Montesquieu.
5. Milton.
6. Locke.
7. Hume.
8. Frederick II. of Prussia.
9. Confucius.
10. Bolingbroke.
11. The authors of the *Federalist*.
12. Bentham.
13. The Emperor Napoleon:

With some account of the lives, and political writings of each. (4) A further division of civil governments, and a proposed classification of all conceivable forms, viz.

I. PURE AND SIMPLE, viz.

1. Theocracy.
2. Patriarchy.
3. Simple Monarchy.
4. Simple Aristocracy.
5. Simple Democracy.

II. PURE AND MIXED, viz.

1. Monarchy combined with aristocracy.

2. Monarchy combined with democracy.
3. Aristocracy combined with democracy.
4. Monarchy, aristocracy and democracy combined.
5. *Quasi* mixed republic, or *quasi* mixed democracy, in which the various Principles rather than the governments are combined.

III. CORRUPT AND SIMPLE, viz.

1. Despotism or tyranny.
2. Oligarchy.
3. Ochlocracy.

IV. CORRUPT AND MIXED.

✍ Either of the foregoing governments may be

1. Single.
2. Confederate.

These divisions and combinations explained and exemplified.

LECTURE X.

OF THE FEUDAL LAW.

PART THE FIRST.

✍ Feudalism on the Continent.

DIVISION I. Occupation of the conquered lands by the Barbarians, and their allotment among the Victors.

- (1) Of Allodial property.
- (2) Of Beneficia and Feuda.

DIVISION II. Whether Beneficia were ever grantable during pleasure only; and how they became hereditary.

Munera, Beneficia, Feuda, how they differ.

Beneficia and Feuda divided into *Proper and Improper*.

Nine species of improper benefices or feuds explained.

DIVISION III. How Counts and Dukes made their offices hereditary.

DIVISION IV. Causes of the prevalence of feudal over allodial property, and of the rise of Tenures.

Theories as to the origin of feuds.
Principal writers who have treated of feuds.

Seven different species of feuds explained.

DIVISION V. Qualities and incidents of feuds.

First, their general qualities, viz.

Homage.

Fealty.

Investiture.

Secondly, Their particular incidents or fruits, viz.

Reliefs.

Primer Seisin.

Fine for alienation.

Attornment.

Escheat.

Aids.

Wardship.

Marriage.

DIVISION VI. Causes of the rise of the Landed Aristocracy, and of the orders and ranks of subjects. Privileges exercised by lords within their fiefs, viz:

Coinage of Money.

Private War.

Taxation.

Legislation.

Judicial Jurisdiction.

Origin of Surnames and Armorial Bearings.

The great variety of baronial customs and laws gave rise to serious conflicts between the judicial decisions of these various baronies, &c.

☞ *Note on the doctrine de conflictu legum.*

DIVISION VII. Progression of the feudal system towards its modern form and aspect.

- (1) Of the original extent and progressive enlargement of the royal authority.
- (2) Of the constitution of the national councils, and the mutations of the legislative power.
- (3) Of the gradual abolishment of territorial jurisdiction; and of the substitution of royal judicial jurisdiction.

Under the three foregoing heads are briefly considered the growth of the Commons; the progress of Taxation; and the preservation of the Roman Law, as it appears in France, Germany &c.

PART THE SECOND.


Feudalism in England.

DIVISION VIII. Of the feudal system in England, and its influence on the jurisprudence of that country, and of the American states.

- (1) Of the true æra of the introduction of feuds into England.
- (2) Of the changes effected by the Norman invasion.
- (3) Brief examination into the nature of English feuds.
- (4) Of the custom of gavelkind.
- (5) Of the different ranks of subjects.
Various other tenures introduced after the Conquest.
- (6) Of the royal revenues, and their various mutations from the time of the Saxons to the present day.
- (7) Of the origin and progress of the English Commons.
- (8) Of the modern English tenures.
- (9) Of the influence of feudalism on the jurisprudence of England and the United States.

APPENDIX II.

AUTHORITIES.

 THE citation of numerous authorities in the progress of the work, has been avoided under the belief that students would rather be confused than aided by them. They are now referred to the following leading works and authorities, in addition to those already cited. These should be carefully read, and, if practicable, in the order in which they are enumerated.

LECTURE I.

Man's moral and intellectual character.

REID'S Essays on the Powers of the Human Mind.
SMITH'S Theory of Moral Sentiments. ARISTOTLE'S Ethicks, Gillies' Translation. STEWART'S First Dissertation, part 1. & 2. GOOD'S Book of Nature, vol. 2. Series III.

Man's physical character.

LORD KAIMES' Sketches of the History of Man.
SMITH'S Essay on the variety in the human form and complexion. BLUMENBACH de generis humani varietate. WHITE on the regular gradation in man and animals. LAWRENCE'S Lectures on the Physiology of Man. GOOD'S Book of Nature, vol. 1. vol. 2. Series II. lectures 7. 8. 9. 10.

LECTURE II.

The State of Nature.

EUNOMUS, Dialogue 1. sec. 17. PLOWDEN'S Jura Anglorum, chap. i. PUFFENDORF, book 2. chap. ii.

HOBBS de corpore politico, chap. i. PAINE'S Rights of Man.

LECTURE III.

Rights of Nature.

PALEY'S Philosophy, 55 to 69. BURLAMAQUI'S Natural Law, vol. 1. part 1. chap. vii. RUTHERFORTH'S Institutes of Natural Law, vol. 1. chap. i. PUFFENDORF, book 2. chap. v. CAMPBELL'S Gro-tius, vol. 1. 168 to 268.

LECTURE IV.

Origin of Primary Society, and of Civil Govern-ment.

GOGUET'S Origin of Laws, vol. 1. Introduction, book 1. articles 1. 2. PLOWDEN'S Jura Anglorum, chap. ii. RUTHERFORTH'S Institutes, vol. 2. chap. ii. PUFFENDORF, book 7. chap. i.

LECTURE V.

Right of Government.

PALEY'S Philosophy, book 4. chap. ii. BURLAMAQUI'S Institutes, vol. 1. part 1. chap. ix. MACAULEY'S Rudiments of Political Science, 125 to 165. PUFFENDORF, book 1. chap. iv. book 7. chap. viii. LOCKE on Government. HARRINGTON'S Works, 364. SIDNEY on Government.

LECTURE VI.

Natural Rights, how affected by Society and Law.

RUTHERFORTH's Institutes, vol. 2. chap. v. viii.
CAMPBELL's Grotius, book 2. chap. ix.

LECTURE VII.

Definitions and General Properties of Laws.

BURLAMAQUI's Institutes, vol. 1. part 1. chap. vii. RUTHERFORTH's Institutes, vol. 1. chap. xviii. PUFFENDORF, book 1. chap. vi. BENTHAM's Principles of Morals and Legislation. BENTHAM's Fragment on Government, Preface. ELLIS's Summary of Roman Law, 15. 61. 1 DAGGE's Criminal Law, 2. 46. 3 Dagg. 91. MONTESQUIEU's Spirit of Laws, books 1. 6. and 29.

LECTURE VIII.

Laws of Nature.

HOOKE's Ecclesiastical Polity, book 1. BURLAMAQUI's Institutes, vol. 1. part 2. chapters i. ii. iii. iv. v. AMOS's Fortescue, chapters xv. xvi. PUFFENDORF, book 2. chap. iii. BENTHAM on GOVERNMENT, 109. ST. GERMAIN's Doctor and Student, dialogue 1. chap. v. WARD's Laws of Nations, chap. ii. GOGUET's Origin of Laws, book 6.

LECTURE IX.

Political Law, and Forms of Government.

PALEY's Philosophy, book vi. RUTHERFORTH's Institutes, vol. 2. chapters iii. iv. x. ARISTOTLE's Politicks, vol. 2. Gillies' translation. MACAULEY's

Rudiments of Political Science. PUFFENDORF, book 7. chap. v. HARRINGTON's Political Aphorisms. HARRINGTON's Oceana. MACHIAVEL's Prince, and his Discourse on the first Decade of Livy. HUME's Essays, vol. 1. part 2. Essays xii. xiii. xvi. AMOS's Fortescue, chap. xiv. HALLAM's Middle Ages, chap. viii.

LECTURE X.

Feudal Law.

ROBERTSON's Charles V. vol. 1. Introduction. BUTLER's Horæ Juridicæ Subsecivæ, 73 to 96. PRIESTLEY's Lectures on History, chap. xlv. GIBBON's Roman Empire, vol. 3. 323. GILBERT STEUART's Historical Dissertation, 62 to 120. WARD's Law of Nations, vol. 1. chaps. xi. xii. MILLAR on Ranks. YORK's Law of Forfeiture, 54 to 62. MILLAR on the English Government, vol. 1. 103 &c. MONTESQUIEU's Spirit of Laws, books 28. 30. 31. HARRINGTON's Works, 59 to 62. BLACKSTONE's Commentaries, vol. 2. chapters iv. v. SULLIVAN's Lectures on Feudal Law. TURNER's History of the Saxon Government. DALRYMPLE on Feudal Property. WRIGHT's Tenures. CRUISE's Digest of the Real Law, vol. 1. chapter i.

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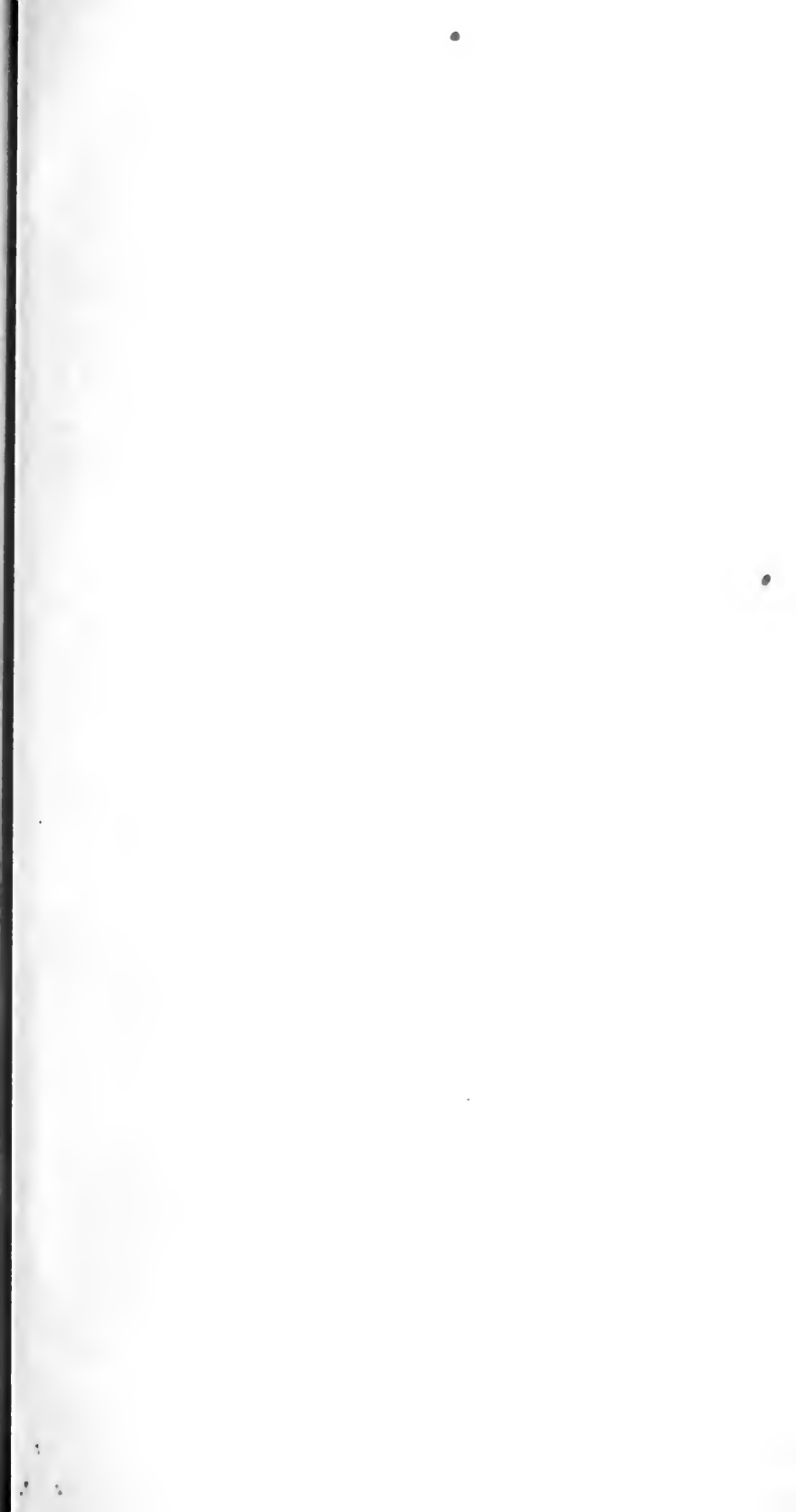
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